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IN THE

Supreme Court of the United States

OCTOBER 1942 TERM

No. 504

ROBERT G. EWALD,
Petitioner,
vs.
THE PEOPLE OF THE STATE OF MICHIGAN,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN

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(Unless otherwise clearly shown by the context, figures in parenthesis refer to the page numbers of the printed record which is a part of the certified record from The Supreme Court of the State of Michigan.)

TO THE SUPREME COURT OF THE UNITED STATES OF AMERICA:

Petitioner herein, Robert G. Ewald, of the City of Detroit, County of Wayne, and State of Michigan, respectfully represents to this Honorable Court:

I.

That for a summary and short statement of the matter involved, he says:

1. That by a document (R. 7-13) issued out of the Circuit Court for the County of Wayne, March 19, A. D. 1941, by Honorable Homer Ferguson, one of the Judges of said Court, sitting as a one man grand jury, so-called, this petitioner was charged with the crime commonly known as accepting a bribe by a public officer, in three counts; that on the same day he was arraigned in the Recorder's Court for the City of Detroit on said document in the manner provided by law for arraignment on warrants; later an information was filed by the Prosecuting Attorney of said County charging petitioner in the same manner with the same offenses, and other proceedings were had in said Recorder's Court; and thereafter a trial was had in said Court before Honorable W. McKay Skillman, one of the Judges of said Court, and a jury, and defendant was, on September 19, A. D. 1941, found guilty by said jury as charged (R. 137), and after denial of a motion for a new trial (R. 139), sentence was imposed on said petitioner October 10, 1941 (R. 139), that he be committed to the State Prison of Southern Michigan and therein confined for a term of not less than three years nor more than ten years, without recommendation.

2. That thereafter, to-wit, December 18, 1941, the said cause was transferred to the Supreme Court of the State of Michigan by filing a claim of appeal, pursuant to the regular practice in the State of Michigan, for review by said Supreme Court of errors in the proceedings in Recorder's Court for the City of Detroit; that thereafter, to-wit, on June 5, A. D. 1942, the said Supreme Court of the State of Michigan affirmed the aforesaid conviction, and a copy of said Supreme Court's opinion is attached to the

certified copy of the printed record of proceedings in said Supreme Court which accompanies this petition; thereafter, to-wit, October 8, A. D. 1942, said Supreme Court denied a petition for a rehearing. (Order of October 8, 1942.)

3. In this petition, Robert G. Ewald prays this Court for a writ of certiorari directed to the Supreme Court of the State of Michigan to bring the record of proceedings in that Court, into this Court for review of the proceedings in the Supreme Court of the State of Michigan above alleged.

4. As aforesaid, the Supreme Court of the State of Michigan affirmed the sentence below June 5, A. D. 1942, and denied a petition for rehearing October 8, 1942.

II.

For a statement of the reasons relied on for allowance of a writ of certiorari, and disclosing the basis on which it is contended that this Court has jurisdiction to review the determination of the Supreme Court of the State of Michigan, petitioner shows:

1. That prior to March 19, A. D. 1941, the Prosecuting Attorney for the said County of Wayne filed a petition in the Circuit Court for the County of Wayne, which court was sitting in the City of Detroit, Michigan, the usual place of holding said court, and which said court was one of general criminal and civil jurisdiction existing under Article VII of the Constitution of the State of Michigan, and various acts of the legislature of said State, praying in said petition that the said court investigate the commission of certain crimes in the County of Wayne (R. 7-13); that pursuant to said petition Honorable Homer Ferguson, one of the Judges of said Court, was designated to sit as

such investigator, that is to say, as a one man grand jury so-called; that said proceedings were pursuant to Sections 1 and 2 of Act No. 196 of the Public Acts of the State of Michigan for the year 1917, being Sections 17217 and 17218 of the Compiled Laws of the State of Michigan for the year 1929 (R. 7), and which sections of the statute are as follows:

> "17217. Sec. 3. Whenever by reason of the filing of any complaint, which may be upon information and belief, any justice of the peace, police judge or judge of a court of record shall have probable cause to suspect that any crime, offense, misdemeanor or violation of any city ordinance shall have been committed within his jurisdiction, and that any person may be able to give any material evidence respecting such offense, such justice or judge in his discretion may, and upon the application of the prosecuting attorney, or city attorney in the case of suspected violation of ordinances, shall require such person to attend before him as a witness and answer such questions as such justice or judge may require concerning any violation of law about which he may be questioned; and the proceedings to summon such witness and to compel him to testify shall, as far as possible, be the same as proceedings to summon witnesses and compel their attendance and testimony, and such witnesses shall be entitled to the same compensation as in other criminal proceedings.
>
> "17218. Sec. 4. If upon such inquiry the justice or judge shall be satisfied that any offense has been committed and that there is probable cause to suspect any person or persons to be guilty thereof, he may cause the apprehension of such person or persons by proper process and, upon the return of such process served or executed, the justice or judge shall proceed with the case, matter or proceeding in like manner as upon formal complaint. And if up such inquiry the justice or judge

shall find from the evidence that there is probable cause to believe that any public officer, elective or appointive and subject to removal by law has been guilty of misfeasance or malfeasance of office or wilful neglect of duty or of any other offense prescribed as a ground of removal, the said justice or judge shall make a written finding setting up the offense so found and shall serve said finding upon the public officer, public board or body having jurisdiction under the law to conduct removal proceedings against said officer. And said finding shall be a sufficient complaint as a basis for removal of said officer and the public officer, public board or public body having jurisdiction of removal proceedings against said officer shall proceed in the method prescribed by law for a hearing and determination of said charges. And in respect of communicating or divulging any statement made by such witnesses during the course of such inquiry, the justice, judge, prosecuting attorney and other person or persons who may, at the discretion of such justice, be admitted to such inquiry, shall be governed by the provisions of law relative to grand jurors."

2. That acting under such powers and authority the said investigator, Honorable Homer Ferguson aforesaid, did, on March 19, A. D. 1941, execute and issue a certain document variously called an indictment, a warrant, a complaint, a presentment, and complaint and warrant (R. 7-13), in which document this petitioner was charged in three counts with the crime commonly known as accepting a bribe by a public officer (R. 7-13), contrary to the provisions of Section 118 of Act No. 328 of the Public Acts of the State of Michigan for the year 1931, being Section 28.313 Michigan Statutes Annotated, which section of the statute is as follows:

> "Sec. 118. Any executive, legislative or judicial officer who shall corruptly accept any gift or gratuity, or any promise to make any gift, or to do any act beneficial to such officer, under an agreement, or with an understanding that his vote, opinion or judgment shall be given in any particular manner, or upon a particular side of any question, cause or proceeding, which is or may be by law brought before him in his official capacity, or that in such capacity, he shall make any particular nomination or appointment, shall forfeit his office, and be forever disqualified to hold any public office, trust or appointment under the constitution or laws of this state, and shall be guilty of a felony, punishable by imprisonment in the state prison not more than ten (10) years, or by fine of not more than five thousand ($5,000) dollars."

3. More specifically, said document (R. 7-13) charged that petitioner was a member of the Common Council of the City of Detroit, a Council of nine members existing pursuant to a city charter which provides for the municipal government of said city, and which said Council was the legislative body thereof, and one of the functions of which under said charter was to approve all contracts to which the said city, or any board or commission thereof, was a party (R. 27); that there existed a certain commission in said City of Detroit created by an act of the legislature of the State of Michigan and certain ordinances of the City of Detroit, commonly called Detroit Housing Commission (R. 29), the function of which was to furnish low cost housing for certain residents of the said City of Detroit; that prior to the period from August 20 to September 18, A. D. 1940, inclusive, said Commission had submitted to the said Common Council for approval certain contracts for the construction of a housing project commonly called the Herman Gardens Project; that among the

proposed contracts so submitted were two certain proposed contracts, one by A. Smith and Company, and one by Lipman Construction Company; and the said document charged that petitioner, as a member of the said Common Council, had accepted certain moneys, promises, and consideration, from representatives of the said A. Smith and Company and Lipman Construction Company to exercise his influence and vote in their favor, to approve the contracts submitted in their behalf.

4. Still more specifically the said document charged that petitioner had, in the City of Detroit, County of Wayne, and State of Michigan:

(a) Had on or about August 20, 1940, corruptly accepted a promise to make a gift, gratuity, or consideration, to-wit, Five Thousand ($5,000) Dollars, under an agreement that his vote, opinion, judgment, or influence would be exercised in a particular manner on a question to come before the Common Council for consideration and determination (R. 8-9).

(b) That he had, on or about August 27, 1940, accepted One Thousand ($1,000) Dollars as a part performance of a promise to pay Five Thousand ($5,000) Dollars to influence his vote, opinion, judgment, and influence in the same way (R. 9-11).

(c) That he had, on or about September 18, 1940, accepted Four Thousand ($4,000) Dollars as part performance of a promise to pay for the same purpose and in the same way (R. 11-13).

5. That on the said day, to-wit, March 19, A. D. 1941, petitioner was arraigned, in the manner provided by law for arraignments on warrants, in another court (R. iv) in the City of Detroit, to-wit, the Recorder's Court for the

City of Detroit, a court not organized under any constitutional provision, but pursuant to Act No. 326 of the Local Acts of the State of Michigan for the year 1883, as amended; and Section 11 of said Act, being Section 16300 of the Compiled Laws of the State of Michigan for the year 1929, provided as follows:

> "16300. Jurisdiction. Sec. 11. The said recorder's court shall have original and exclusive jurisdiction of all prosecutions and proceedings in behalf of the people of this state, for crimes, misdemeanors, and offenses arising under the laws of this state, and committed within the corporate limits of the city of Detroit, except in cases cognizable by the police court of the city of Detroit, or by the justices of the peace of said city; and shall have power to issue all lawful writs and process, and to do all lawful acts which may be necessary and proper to carry into complete effect the powers and jurisdiction given by this act, and especially to issue all writs and process, and to do all acts which the circuit courts of this state, within their respective jurisdictions, may, in like cases, issue and do by the laws of this state: Provided, That this section shall not be construed to prevent the grand jury for the County of Wayne from inquiring into and presenting indictments, as heretofore, for crimes and offenses committed within the limits of said city."

6. That on May 19, 1941, a motion to quash the so-called warrant was filed in said Recorder's Court, charging that said court has no jurisdiction over said cause because under the section of the statute quoted in the last preceding paragraph the said Recorder's Court for the City of Detroit had original and exclusive jurisdiction over crimes committed in the City of Detroit, and no warrant or other document from any other court could confer jurisdiction on

it, and for other reasons as set up in said motion (R. 13-15), and said motion was duly denied by the court.

7. That thereafter, after a preliminary examination had before a magistrate, the Prosecuting Attorney of Wayne County aforesaid filed an information in the said cause charging defendant in substantially the same manner with the same offenses as the so-called warrant, a copy of which information is hereto attached, marked Exhibit "A."

8. That on August 26, 1941, a plea to the jurisdiction (R. 16) was filed in the Recorder's Court for the City of Detroit, in said cause, alleging as follows:

> "1. The so-called one-man grand jury had no power or jurisdiction to issue a warrant predicated upon the alleged commission of a crime in the City of Detroit.
>
> "2. The warrant under which said defendant was arrested in this case was void.
>
> "3. The so-called one-man grand jury had no power or jurisdiction to issue a warrant predicated upon an alleged crime in the City of Detroit and to certify the same to this court.
>
> "4. No proper or valid proceedings have been instituted in this court for the purpose of arresting the defendant and causing him to answer the charge alleged in such warrant.
>
> "5. The order of the Examining Magistrate holding the defendant for trial is totally void as being made without jurisdiction."

This motion was duly denied August 29, 1941 (R. v, 20).

9. That a motion to quash the information was filed in said court and cause August 29, A. D. 1941, charging as follows (R. 17-19):

"1. From all of the competent evidence given at the preliminary examination in this case it does not appear that a crime has been committed nor does there appear probable cause to believe that defendant committed the crime charged in such warrant, and the action of the examining magistrate in holding defendant for trial constituted an abuse of discretion.

"2. The warrant issued by the Honorable Homer Ferguson, Circuit Judge, on the 19th day of March, 1941, and apprehension and arrest of the defendant thereunder, are void and of no legal force or effect whatsoever in that the warrant shows upon its face that the crime, if any, was committed within the limits of the City of Detroit, and by reason thereof said Circuit Judge had no power or jurisdiction to investigate the same or to issue any warrant predicated thereon, or to take any other action seeking the trrest and prosecution of defendant by reason thereof.

"3. Said warrant and the apprehension and arrest of the defendant thereunder are void and of no legal force or effect whatsoever because the filing of the complaint or petition of the Prosecuting Attorney for an investigation of the commission of alleged crime in the County of Wayne filed in the Circuit Court for the County of Wayne under miscellaneous No. 67,804 could not and did not vest any jurisdiction in said Circuit Judge or the Circuit Court to investigate or institute prosecutions for crimes committed outside the jurisdiction of the Circuit Court, namely, in the City of Detroit and hence within the original and exclusive jurisdiction of the Recorder's Court for the city of Detroit.

"4. In proceedings properly brought under Section 17,217 and 17,218 and other sections of the Compiled Laws of the State of Michigan for 1929 relative to the investigation of suspected offenses, the Judge before whom such investigation is being

conducted has no power or jurisdiction to issue a warrant to require the defendant to be brought before any other judge than the one who issued the warrant under such proceedings, and said judge, therefore, had no power or jurisdiction to command the arresting officer to bring defendant before the Recorder's Court of the City of Detroit.

"5. No order in writing allowing the issuance of a warrant or process against defendant, signed by the Prosecuting Attorney, has been filed in this court; no complaint for that purpose has been filed in this court; no warrant for the apprehension and arrest of defendant has been issued out of this court; the warrant under which defendant was apprehended and arrested was not issued by any judge of this court in proceedings for the investigation of crime under Sections 17,217, *et seq.*, Compiled Laws of 1929; and no true bill against the defendant has been presented or returned to this court by any grand jury sitting herein pursuant to Section 17,221, *et seq.*, Compiled Laws of 1929; and by reason thereof, this court is wholly without power or jurisdiction to proceed against defendant in this manner."

This motion was denied September 15, 1941 (R. v, 20).

10. That on September 16, A. D. 1941, trial commenced before Honorable W. McKay Skillman, one of the Judges of the Recorder's Court for the City of Detroit, and a jury (R. 20).

11. It was the theory of the Prosecutor at said trial that one Seymour Smith, representing A. Smith and Company, and William Lipman, representing Lipman Construction Company, were the givers of said bribe, said Prosecutor stating as follows (R. 24-26):

"The People will further attempt to prove that Seymour Smith and William Lipman set aside a

certain amount of money and that this money was set aside for the specific purpose of bribing certain members of the Common Council.

* * * * *

"The People will further attempt to prove that one Albert J. O'Connor was acting as the agent for the Smith-Lipman Company and the Abe Smith Company and did receive these monies from these companies—Smith-Lipman Company who eventually got the contract for the Herman Garden's Project. That Albert J. O'Connor brought about a meeting with the defendant Ewald and William Lipman and Seymour Smith; an agreement was reached whereby Mr. Ewald was to receive five thousand dollars—

* * * * *

"'That Mr. Ewald did receive five thousand dollars; that Mr. Ewald did vote for the Smith-Lipman Company for the concrete structure and that Smith-Lipman did get the contract. That on the 27th day of August, 1940, that is the day the matter first came before the Common Council for a vote, Mr. O'Connor paid Mr. Ewald one thousand dollars as a part of the bribe agreed upon. That later, on the 18th day of September, 1940—

* * * * *

"Then on the 18th day of September, 1940, Mr. O'Connor paid the defendant Robert G. Ewald four thousand dollars which was the amount of the bribe agreed upon, totalling five thousand dollars upon which Mr. Ewald voted in favor of and let the contract to Smith and Lipman."

12. That the Prosecuting Attorney offered in evidence the testimony of Albert J. O'Connor as to certain conversations which the witness allegedly had with the said Seymour

Smith and William Lipman, and certain acts and doings of the said Smith and Lipman, not in the presence or hearing of this petitioner, all touching and concerning the matters in issue, to which testimony the petitioner as defendant, through his attorney, interposed objections as follows (R. 49-50):

> "1. Such testimony would constitute hearsay and is not admissible under any theory of a conspiracy involving this defendant because the acceptance of a bribe is a separate and distinct crime from the offering or giving of a bribe, and an agreement between the acceptor and the giver does not constitute a conspiracy, under the holding in the *United States Court v. Dietrich,* 126 Fed. 664.
>
> "2. Introduction of such testimony would constitute a violation of defendant's constitutional rights to be confronted by the witnesses against him as guaranteed by Article II, Section 19, Michigan Constitution and by Article VI of the Constitution of the United States (reading:) * * *"

13. Over the aforesaid objections in behalf of this petitioner, and over separate objection to each item of testimony, on the theory that the said Lipman, Smith, and the witness O'Connor, were all co-conspirators of defendant, this petitioner, to commit the crimes charged, the said witness O'Connor was permitted to testify in answer to questions put by the Prosecuting Attorney that on August 20, 1940, Lipman suggested that the witness contact petitioner by telephone, which he did (R. 58), that at that time Smith and Lipman stated that it would take a lot of money to get this contract and asked O'Connor to hold Thirty Thousand ($30,000.00) Dollars available to be expended at their request, to secure the contract for the Herman Gardens Project, and that right after the conversation Smith and Lipman gave O'Connor the Thirty Thousand ($30,000.00) Dol-

lars (R. 61, 62) comprised of two checks,—$10,000 by Lipman and $20,000 by Smith, that O'Connor made out a deposit slip and gave the checks to Lipman for deposit in a Chicago bank, and that Lipman told O'Connor that defendant, this petitioner, had suggested that he, O'Connor, hold the money (R. 63), and that after the money had been deposited in the Chicago bank Smith asked O'Connor to call this petitioner on the telephone and to so inform him (R. 65), which O'Connor did, and that later Smith stated to O'Connor, "that Mr. Ewald was a little uneasy and I better take him up a thousand dollars" (R. 66), and that Smith said, "We might as well take a chance and give it to him" (R. 68), all of which conversations, acts, and doings occurred in the said City of Detroit, County of Wayne, and State of Michigan, according to the testimony of the said O'Connor.

14. That after testimony had been completed and arguments had by counsel and instructions by the court (R. 100-131), the said jury on September 19, A. D. 1941, returned a verdict as follows (R. 137):

> "The jury heretofore impaneled and sworn now resume their deliberations. At 10:30 A. M. they come again into court and say upon their oaths that they find defendant guilty on all three counts. On motion of defense counsel the clerk polls the jury and each juror swears that is and was his verdict.
>
> "Defendant referred to Probation Office for report and sentence on September 26, 1941. Bond continued pending sentence."

15. Thereafter, on September 25, A. D. 1941, a motion for a new trial was filed (R. 138-139), and same was denied October 3, 1941 (R. 139), said motion being based on the following grounds (R. 138-139):

"1. The verdict was against the great weight of the evidence.

"2. The verdict was contrary to law.

"3. The Court erred in admitting testimony of alleged acts, statements, and conversations of persons not made or had in the presence of defendant.

"4. The Court erred in admitting testimony as to statements alleged to have been made by Smith and Lipman, or either of them, not in the presence of the defendant.

"5. The Court erred in submitting the question to the jury as a question of fact as to whether or not a conspiracy existed between Smith, Lipman, O'Connor, or any of them.

"6. The Court erred in submitting to the jury as a question of fact the issue as to whether certain alleged conversations between defendant and the witness Dingeman were serious or jocular.

"7. The Court was without jurisdiction to try said cause for the reasons set up in defendant's plea to the jurisdiction.

"8. The Court was without jurisdiction to try said cause for the reasons set up in defendant's motion to quash the indictment.

"9. The Court erred in denying defendant's motion for a directed verdict of not guilty made at the close of the People's case, for the reasons set up in said motion.

"10. The Court erred in denying defendant's motion to strike the testimony of the witness O'Connor relative to statements made and conversations had by persons not in the present of defendant."

16. That thereafter, to-wit, October 10, A. D. 1941, the said Honorable W. McKay Skillman, one of the Judges of

Recorder's Court for the City of Detroit, as aforesaid, imposed sentence as follows (R. 139-140):

> "The above named defendant being in open court for sentence and having been heard in response to the statutory questions propounded to him, is sentenced by the Court, he being now of the age of sixty-five (65) years, be committed to the State Prison of Southern Michigan, in the County of Jackson, and therein confined for a term of not less than three (3) years nor more than ten (10) years. The Court makes no recommendation. The statutory maximum penalty for the crime of which said defendant stands convicted is ten (10) years. Warrant and commitment papers issued.
>
> "Thereupon it is ordered by the Court, that the bail for said defendant be fixed at ten thousand ($10,000.00) dollars with one (1) good and sufficient surety, pending an appeal of said cause to the Supreme Court of the State of Michigan."

17. That thereafter, the said cause was transferred to the Supreme Court for the State of Michigan, the highest court in said state, on December 18, A. D. 1941, by appropriate proceedings in accordance with the rules and practices prevailing in the State of Michigan, in a general appeal to the said Supreme Court from the sentence imposed October 10, A. D. 1941, above set forth, and reasons and grounds of appeal were assigned, among others, as follows (R. 2-6):

> "1. The court erred in overruling defendant's motion to quash the warrant and service thereof.
>
> "2. The court erred in overruling defendant's motion to quash the information.
>
> "3. The court erred in overruling defendant's plea to the jurisdiction.
>
> "4. The verdict is against the great weight of the evidence.

"5. The verdict and judgment is contrary to law.

"6. The court erred in permitting the witness O'Connor to give testimony, over timely objections of defendant, as to acts done and statements made by certain parties, namely Smith and Lipman, such acts and statements having been made out of the presence and hearing of defendant, and the said Smith and Lipman being neither in fact nor in law co-conspirators with defendant.

"7. The court was wholly without jurisdiction to proceed under an information which was predicated upon a warrant by a Circuit Judge for the County of Wayne sitting as a so-called one man Grand Jury which had no jurisdiction to issue warrants based upon a crime committed in the City of Detroit.

"8. The court erred in overruling defendant's motion for a directed verdict of not guilty.

* * * * *

"10. The Court erred in charging the jury as follows:

"'You will note there is testimony offered here and endorsed on the information are the names of Smith and Lipman. You will note also that the court permitted this proof to go in; on the theory that is claimed by the Prosecution of a conspiracy between Smith and Lipman and O'Connor and Ewald to bring about the bribery of Ewald under Section 118, which I have read to you.

"'It is on that theory that while Ewald is alone charged with the crime, yet it is claimed, and the theory of it is that that was by virtue of a conspiracy between those four persons that the bribery came about—this alleged bribery came about. So it is on that theory that I have permitted that evidence.

" 'What is a conspiracy? A conspiracy is an unlawful agreement or understanding between two or more persons to do an unlawful or illegal act. I don't need to mention the other phase because it isn't involved here. The rest of the definition is, "or to do a lawful act by illegal and unlawful means," but that isn't involved here. A conspiracy is an unlawful understanding between two or more persons to an unlawful or illegal act. The bribery of a public official under Section 118 is such an illegal and unlawful act. If you are satisfied beyond a reasonable doubt that there was such an illegal or unlawful understanding between these four men to bring about a violation of Section 118—that's the bribery statute—if you are satisfied beyond a reasonable doubt, then you have satisfied your minds of the existence of a conspiracy.

" 'You must first, therefore, determine that there was such a conspiracy. A conspiracy is merely the unlawful agreement or understanding to bring about an unlawful act. If you find from the evidence, and all the evidence, that there was such an agreement to do so, then you have established affirmatively in your mind the existence of such a conspiracy.

" 'If you have established the existence of such conspiracy, then under the rules of evidence, the statements, declarations and acts of co-conspirators, during the time of the conspiracy, which are not in the presence of the others, are admissible because that is one of the exceptions to the hearsay rule. In an ordinary case, what O'Connor said to Smith and Lipman, or either of them, not in the hearing and presence of Ewald, would not be admissible against Ewald, but if done on the theory of a conspiracy, and if the State establishes the existence of such a conspiracy in your minds beyond a reasonable doubt,

you should entirely disregard any conversations had, not in the presence and hearing of the defendant Ewald, between O'Connor and Smith and Lipman or Smith or Lipman.'

"11. The court erred in charging the jury as follows:

" 'If you are to consider the conversation between O'Connor, Smith and Lipman, in the absence of Ewald, it will have to be on the theory that the four of them entered into a conspiracy. beyond a reasonable doubt, to bring about the violation of Section 118, then and in that event, all that testimony is competent, and the weight to be given it is a question of fact for the jury.' "

18. That thereafter, to-wit, June 5, A. D. 1942, after various and sundry proceedings in the said Supreme Court for the State of Michigan, and after a full hearing on the merits, the said Supreme Court of the State of Michigan affirmed the aforesaid sentence of the Recorder's Court for the City of Detroit, and stated its reasons in writing, a true copy of which opinion is hereto attached marked Exhibit "B."

19. That thereafter a petition for a rehearing was duly filed in said Supreme Court for the State of Michigan, a true copy of which is hereto attached, marked Exhibit "C," and the same was denied September 8, A. D. 1942.

20. That in the Recorder's Court for the City of Detroit, as aforesaid, by means of the aforesaid motion to quash the warrant filed May 19, 1941 (R. 13-15), by the plea to the jurisdiction filed August 26, 1941 (R. 16), by the motion to quash the information and warrant filed August 29, 1941 (R. 17-19), and by means of various and sundry objections to the admission of testimony heretofore referred to; and in the Supreme Court for the State of

Michigan by reason of the reasons and grounds of appeal above set out, this petitioner specially set up and claimed certain titles, rights, privileges, and immunities under the Constitution of the United States of America; more specifically he claims that his titles, right, privileges, and immunities under the so-called due process clause of Section 1 of the Fourteenth Amendment to the said Constitution, which said amendment guarantees to this petitioner the fundamental rights to (a) be tried in court of competent jurisdiction, and (b) to be conforted by the witnesses against him, were violated and denied by the determination of the Supreme Court of the State of Michigan in its affirmance of the sentence imposed in the Recorder's Court for the City of Detroit October 10, A. D. 1941, and by the denial of the said Supreme Court on September 8, A. D. 1942, of the aforesaid petition for a rehearing.

21. And the said Supreme Court of the State of Michigan being the highest court of said state, and it having by its final judgment of June 5, A. D. 1942, deprived petitioner of certain titles, rights, privileges, and immunities, guaranteed by Section 1 of the Fourteenth Amendment to the Constitution of the United States of America, as aforesaid, it is claimed that this Court has jurisdiction of the subject matter herein involved under Section 237 (b) of the Act of Congress of February 13, 1925, Chapter 229, 43 Sta. 936, which is as follows:

> "(b) It shall be competent for the Supreme Court, by certiorari to require that there be certified to it for review and determination, with the same power and authority and with like effect as if brought up by writ of error, any cause wherein a final judgment or decree has been rendered or passed by the highest court of a State in which a decision could be had where is drawn in question the validity of a treaty or statute of the United

States, or where is drawn in question the validity of a statute of any State on the ground of its being repugnant to the Constitution, treaties, or laws of the United States; or where any title, right, privilege, or immunity is specially set up or claimed by either party under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States; and the power to review under this paragraph may be exercised as well where the Federal claim is sustained as where it is denied. Nothing in this paragraph shall be construed to limit or detract from the right to a review on a writ of error in a case where such a right is conferred by the preceding paragraph; nor shall the fact that a review on a writ of error might be obtained under the preceding paragraph be an obstacle to granting a review on certiorari under this paragraph."

III.

For a more specific statement of the questions presented petitioner says:

1. That he claims that the affirmance by the Supreme Court of the State of Michigan, on June 5, A. D. 1942, of the sentence imposed on him October 10, A. D. 1941, by Recorder's Court for the City of Detroit, deprives him, this petitioner, of titles, rights, privileges, and immunities guaranteed him by Section 1 of the Fourteenth Amendment to the Constitution of the United States of America, the so-called due process clause, because (a) it deprived him of the right and privilege of a trial in a court of competent jurisdiction of the charge against him, and denied him the immunity from trial in a court not having competent jurisdiction, because under the section of the statute of the State of Michigan above quoted the Recorder's Court for the City of Detroit has original and exclusive

jurisdiction of crimes committed within the corporate limits of the City of Detroit, that this crime, if any, was committed within the corporate limits of the City of Detroit, that consequently a document issued by the Circuit Court for the County of Wayne and originating therein could not confer upon the Recorder's Court for the City of Detroit jurisdiction over the crimes charged, and did not so confer jurisdiction, and that there was no process of any sort issued out of the Recorder's Court for the City of Detroit originating said charge therein, that said cause did not originate therein, and that therefore the said Recorder's Court for the City of Detroit never acquired jurisdiction thereof, and never had jurisdiction thereof, and (b) it deprived him, this petitioner, of the fundamental right of being confronted by the witnesses against him, because through the testimony of the witness Albert J. O'Connor, one of the Prosecutor's witnesses, the acts and doings and statements of certain other persons, to-wit, Smith and Lipman, not had in the presence of the defendant petitioner, were allowed to be put in evidence, and no opportunity was offered or permitted petitioner to be confronted by the said Smith and Lipman, nor to cross-examine them, and that the same was offered and received in evidence under the erroneous theory that Smith, Lipman and O'Connor were co-conspirators with petitioner, whereas as a matter of fact and law they were not such co-conspirators by reason of the fact that it was alleged that this petitioner was the receiver of a bribe, whereas under the admitted theory of the prosecutor Smith, Lipman, and O'Connor were givers of the bribe, and that the same are two separate and distinct crimes and under the holdings of this court and that of the Supreme Court of the State of Michigan they could not be co-conspirators and were not co-conspirators; that denial of said rights, privileges, and immunities is contrary to due process of law and there-

fore in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States, as aforesaid, the so-called due process clause.

Wherefore, petitioner herein, Robert G. Ewald, prays that this Court by its writ of certiorari, directed to the Supreme Court of the State of Michigan, require that the record in this cause be certified to this Court for review and determination of the final judgment o fthat court in said cause.

And petitioner will ever pray, etc.

Robert G. Ewald,
Petitioner.

Edward N. Barnard,
Attorney for Petitioner,
906 Dime Building,
Detroit, Michigan.

State of Michigan,
County of Wayne—ss.

On this 22nd day of October, A. D. 1942, before me, a Notary Public in and for said County and State, personally appeared Robert G. Ewald, to me personally known, who being by me duly sworn, did depose and say that he has read the foregoing Petition for Writ of Certiorari to the Supreme Court of the State of Michigan by him subscribed as petitioner; that he knows the contents thereof and that the same is true of his own knowledge, except as to those matters therein stated to be upon information and belief and as to those matters he believes it to be true.

Agnes Secor,
Notary Public, Wayne County, Michigan.
My commission expires December 10, 1945.

EXHIBIT "A"

INFORMATION FOR BRIBE, PUBLIC OFFICIAL ACCEPTING

State of Michigan,
County of Wayne,
City of Detroit—ss.

The Recorder's Court of the City of Detroit.

In the Name of the People of the State of Michigan, William E. Dowling, Prosecuting Attorney in and for the said County of Wayne, who prosecutes for and on behalf of the People of said State in said Court, comes now here in said Court in the July term thereof, A. D. 1941, and gives the said Court to understand and be informed that Robert G. Ewald, late of the said City of Detroit, in said County, heretofore, to-wit, on or about the 20th day of August, A. D. 1940, at the said City of Detroit, in the County aforesaid, being a duly authorized public official, to-wit, a legislative officer, a member of the Common Council of the City of Detroit duly elected and qualified, and acting as such, did corruptly accept a promise to make a gift, gratuity or consideration, to-wit, five thousand dollars ($5,000.00), to him, under an agreement or with an understanding that his vote, opinion, judgment or influence, as such public officer, would be given in a particular manner or upon a particular side of a question, cause, or proceeding, in the City of Detroit, Wayne County, Michigan, which might be pending or might by law be brought before him in his official capacity as such public officer, and that he, in consideration of such promise to make a gift, gratuity, or consideration would vote for and in favor of all questions, proceedings, resolutions and recommendations, whereby the Detroit Housing Commission, a Commission created by Ordinance 262-C, as amended by Ordinance No. 46-D and Ordinance

No. 84-D, of the Ordinances of the City of Detroit, which ordinances were enacted pursuant to Act No. 18 of the Public Acts of 1933 of the State of Michigan, as amended by Act No. 5 of the Public Acts of 1938 of the State of Michigan, would be authorized and directed to enter into a contract with A. Smith & Company and Lipman Construction Company for the general construction of S. James Herman Gardens Project, Michigan No. 1-4, Base Bid No. 1, masonry construction, for the sum of eight million three hundred thirty thousand dollars ($8,330,000.00); and that subsequent thereto, in consideration of said promise, he did vote in favor of resolutions, recommendations and proceedings, and did vote on the side that gave the contract to A. Smith & Company and Lipman Construction Company for the general construction of S. James Herman Gardens Project, Michigan No. 1-4, Base Bid No. 1, masonary construction, and that as a result of the adoption of resolutions, recommendations and proceedings, said contract was awarded to the A. Smith & Company and Lipman Construction Company, said project being a United States Housing Authority project, to be constructed in the City of Detroit, State of Michigan; contrary to the form of the statute, etc.

And the said Prosecuting Attorney, William E. Dowling, who prosecutes for and on behalf of the People of said State in said Court, comes now here in said Court at the term aforesaid, and gives the said Court further to understand and be informed that Robert G. Ewald, late of the City of Detroit, State of Michigan, heretofore, to-wit, on or about the 27th day of August, A. D. 1940, at the City of Detroit aforesaid, in the County aforesaid, being a duly authorized public official, to-wit, a legislative officer, a member of the Common Council of the City of Detroit, and was duly elected and qualified and acting as such, did corruptly accept a gift, gratuity, or consideration, to-wit, One Thousand Dollars ($1,000.00), as part performance of a

prior promise to him to pay to him Five Thousand Dollars ($5,000.00) to do an act under an agreement and with an understanding that his vote, opinion, judgment or influence would be given in a particular manner, and upon a particular side of a question, cause or proceeding, in the City of Detroit, Wayne County, Michigan, which might be pending or might by law be brought before him in his official capacity as such public officer, and that he would vote for resolutions, recommendations or proceedings that might be pending or might by law be brought before him in his official capacity as such public officer, to award the contract for the construction of the S. James Herman Gardens Project, Michigan No. 1-4, to the A. Smith & Company and Lipman Construction Company under Base Bid No. 1, masonry construction, and that in consideration of such promise to make a gift, gratuity or consideration of Five Thousand Dollars ($5,000.00), he did vote, in his official capacity, as such public officer, for the following resolution, to-wit:

> "Resolved, that the Detroit Housing Commission be and it is hereby authorized and directed to enter into a contract with A. Smith & Company and Lipman Construction Company for the general construction of the S. James Herman Gardens Project, Michigan No. 1-4, Base Bid No. 1, masonry construction, for the sum of eight million three hundred thirty thousand ($8,330,000.00) Dollars,"

and other resolutions, recommendations or proceedings pertaining to a contract on S. James Herman Gardens Project, Mich. No. 1-4, Base Bid No. 1, masonry construction, which resolutions, recommendations or proceedings were brought before him by law; that said resolution, recommendations or proceedings were adopted by the Common Council of the City of Detroit, and that as a result of the adoption of said resolutions, recommendations or proceedings, said contract was awarded to A. Smith & Company

and Lipman Construction Company for the general construction of the S. James Herman Gardens Project, Michigan No. 1-4, Base Bid No. 1, masonry construction, said project being a United States Housing Authority Project to be constructed in the City of Detroit, State of Michigan; contrary to the form of the statute, etc.

And the said Prosecuting Attorney, William E. Dowling, who prosecutes for and on behalf of the People of said State in said Court, comes now here in said Court at the term aforesaid, and gives the said Court further to understand and be informed that Robert G. Ewald, late of the City of Detroit, State of Michigan, heretofore, to-wit, on or about the 18th day of September, A. D. 1940, at the City of Detroit aforesaid, in the County aforesaid, being a duly authorized public official, to-wit, a legislative officer, a member of the Common Council of the City of Detroit, and duly elected and qualified and acting as such, did corruptly accept a gift, gratuity, or consideration, to-wit, Four Thousand Dollars ($4,000.00) as part performance of a prior promise to him to pay him Five Thousand Dollars ($5,000.00), to do an act under an agreement and with an understanding that his vote, opinion, judgment or influence would be given in a particular manner, and upon a particular side of a question, cause, or proceeding, in the City of Detroit, Wayne County, Michigan, which might be pending or might by law be brought before him in his official capacity as such public officer, and that he would vote for resolutions, recommendations or proceedings that might be pending or might by law be brought before him in his official capacity as such public officer, to award the contract for the construction of the S. James Herman Gardens Project, Michigan No. 1-4, to the A. Smith & Company and Lipman Construction Company under Base Bid No. 1, masonry construction, and that in consideration of such promise to make

a gift, gratuity, or consideration of five thousand dollars ($5,000.00) he did vote, in his official capacity as such public officer, for the following resolution, to-wit:

> "Resolved, that the Detroit Housing Commission be and it is hereby authorized and directed to enter into a contract with A. Smith & Company and Lipman Construction Company for the general construction of the S. James Herman Gardens Project, Michigan No. 1-4, Base Bid No. 1, masonry construction, for the sum of eight million three hundred thirty thousand ($8,330,000.00) Dollars,"

and other resolutions, recommendations or proceedings pertaining to a contract on S. James Herman Gardens Project, Mich. 1-4, Base Bid No. 1, masonry construction, which resolutions, recommendations or proceedings were brought before him by law; that said resolution was adopted by the Common Council of the City of Detroit, and that as a result of the adoption of said resolutions, recommendations or proceedings, said contract was awarded to A. Smith & Company and Lipman Construction Company for the general construction of the S. James Herman Gardens Project, Michigan No. 1-4, Base Bid No. 1, masonry construction, said project being a United States Housing Authority Project to be constructed in the City of Detroit, State of Michigan; contrary to the form of the Statute in such case made and provided, and against the peace and dignity of the People of the State of Michigan.

Note—See Sec. 118 MPC 1931, 17115—118 M.A.S. Supp. 1940.

Wm. E. Dowling,
Prosecuting Attorney.

Drafted by Chas. R. A. Smith.

Witnesses—Harry B. Duff, Albert J. O'Connor, Thomas Leadbetter, Fred R. Sitter, Gerald Walter, Carl A. Nelson, Harry J. Dingeman.

EXHIBIT "B"

STATE OF MICHIGAN—SUPREME COURT

The People of the State of Michigan,
Plaintiff and Appellee,
v.
Robert G. Ewald,
Defendant and Appellant.

Before the Entire Bench.

Sharpe, J.

Defendant Robert G. Ewald was convicted of bribery in violation of Act No. 328, §118, Pub. Acts 1931 (Comp. Laws Supp. 1940, 17115—118, Stat. Ann. §28.313), which reads as follows:

> "Any executive, legislative or judicial officer who shall corruptly accept any gift or gratuity, or any promise to make any gift, or to do any act beneficial to such officer, under an agreement, or with an understanding that his vote, opinion or judgment shall be given in any particular manner, or upon a particular side of any question, cause or proceeding, which is or may be by law brought before him in his official capacity, or that in such capacity, he shall make any particular nomination or appointment, shall forfeit his office, and be forever disqualified to hold any public office, trust or appointment under the constitution or laws of this state, and shall be guilty of a felony, punishable by imprisonment in the state prison not more than ten years, or by fine of not more than five thousand dollars."

The information charged defendant upon three counts. The first count in the information charged bribery in that defendant accepted a promise of $5,000 for corrupt purposes. The second and third counts charged acceptance of $1,000 and $4,000 in execution of the promise previously accepted. It was charged that the $1,000 was accepted on or about August 27, 1940, and $4,000 on or about September 18, 1940.

Defendant was a member of the common council of the city of Detroit. Under the ordinances of the city of Detroit, defendant, as a member of the common council, was to vote on the approval of all contracts of the Detroit housing commission.

The Detroit housing commission had under consideration the matter of the construction of the S. James Herman Garden Housing Project and on August 16, 1940, passed a resolution in favor of awarding the contract for steel construction of the project to Maurice L. Bein, Inc.

This recommendation of the Detroit housing commission was rejected; and on August 27, 1940, the common council of the city of Detroit had before it for consideration whether the construction should be steel or concrete. On that date, it tabled a resolution to award the contract to A. Smith and Company and Lipman Construction Company for concrete construction. On September 3rd, the common council voted in favor of this resolution and later the contract was awarded to A. Smith and Company and Lipman Construction Company. Defendant, Robert G. Ewald, voted in favor of Smith and Lipman for concrete construction.

Prior to this time there was much public discussion of graft, bribery and corruption in high official circles and Circuit Judge Homer Ferguson was designated by the cir-

cuit judges of Wayne county to conduct the proceedings for the discovery of crime under 3 Comp. Laws 1929, §§17217, et seq. (Stat. Ann. §28.943, et seq.). As a result of this inquiry the circuit judge issued findings stating that he was satisfied that there was probable cause to suspect that defendant had committed a felony by accepting a bribe. The complaint and warrant, directed to law enforcement officers, commanded that defendant be apprehended and brought before the recorder's court of the city of Detroit to be dealt with according to law. A judge of the recorder's court sitting as an examining magistrate conducted an examination to determine whether a crime had been committed. Defendant appeared specially for the purpose of challenging the jurisdiction of the recorder's court to conduct an examination on the ground that Judge Ferguson had no power or jurisdiction to investigate or to take any action seeking the arrest and prosecution of defendant because if any crime was committed, it was committed in the city of Detroit. Defendant's motion to quash the information for the reasons above stated was denied by the examining magistrate and he was held for trial. The cause proceeded to trial and was submitted to a jury at the close of the people's case. Defendant did not testify or produce any defense witnesses. The jury found defendant guilty on all three counts.

Defendant appeals and contends that a circuit judge sitting as a one-man grand jury in Wayne county has no jurisdiction to issue a warrant covering a crime committed in the city of Detroit; that original and exclusive jurisdiction of all offenses committed within the city of Detroit is, by statute, vested solely in the recorder's court of the city of Detroit.

It is urged by the prosecuting attorney that proceedings for "discovery" of crime in the Wayne circuit court do

not come within the grant of exclusive jurisdiction to the recorder's court of "prosecutions and proceedings" for crimes committed in the city of Detroit; that the statutes relating to the recorder's court provide that such court is to be governed by general law "so far as the same may apply."

The recorder's court act (3 Comp. Laws 1929, §§16290 et seq., Stat. Ann. §§27.3551 et seq.) provides in part as follows:

> "The said recorder's court shall have original and exclusive jurisdiction of all prosecutions and proceedings in behalf of the people of this state, for crimes, misdemeanors, and offenses arising under the laws of this state and committed within the corporate limits of the city of Detroit, except in cases cognizable by the police court of the city of Detroit, or by the justices of the peace of said city; and shall have power to issue all lawful writs and process, and to do all lawful acts which may be necessary and proper to carry into complete effect the powers and jurisdiction given by this act, and especially to issue all writs and process, and to do all acts which the circuit courts of this state, within their respective jurisdictions, may, in like cases, issue and do by the laws of this state: *Provided,* That this section shall not be construed to prevent the grand jury for the county of Wayne from inquiring into and presenting indictments, as heretofore, for crimes and offenses committed within the limits of said city." (3 Comp. Laws 1929, §16300, Stat. Ann. §27.3561.)
>
> "All indictments for offenses committed within the limits of the city of Detroit, which may be found and presented to the circuit court for the county of Wayne, by the grand jury of said county, shall be forthwith certified and transmitted by the clerk of said circuit court to said recorder's court,

and thereupon said recorder's court shall have as full and complete jurisdiction of said indictments as if the same had been originally presented to said recorder's court, and shall have full power to take all further proceedings thereon." (3 Comp. Laws 1929, §16301, Stat. Ann. 27.3562.)

"In all prosecutions for crimes, misdemeanors, and offenses arising under the laws of this state, said recorder's court shall be governed in the same manner as the circuit courts of the state are, by the general laws thereof, which, so far as the same may apply, are hereby made applicable to said recorder's court, its officers and all proceedings therein, subject to the provisions of this act." (3 Comp. Laws 1929, §16320, Stat. Ann. §27.3581.)

The pertinent portions of the code of criminal procedure (3 Comp. Laws 1929, §§17116 et seq., Stat. Ann. §§28.841 et seq.) provide:

"This act is hereby declared to be remedial in character and as such shall be liberally construed to effectuate the intents and purposes thereof." (3 Comp. Laws 1929, §17117, Stat. Ann. §28.842.)

"* * * The word 'indictment' includes information, presentment, complaint, warrant and any other formal written accusation.

"The word 'indictment,' unless a contrary intention appears, includes any court thereof." (3 Comp Laws 1929, §17118, Stat. Ann. §28.843.)

"Whenever by reason of the filing of any complaint, which may be upon information and belief, any justice of the peace, police judge or judge of a court of record shall have probable cause to suspect that any crime, offense, misdemeanor or violation of any city ordinance shall have been committed within his jurisdiction, and that any person may be able to give any material evidence respect-

ing such offense, such justice or judge in his discretion may, and upon the application of the prosecuting attorney, or city attorney in the case of suspected violation of ordinances, shall require such person to attend before him as a witness and answer questions as such justice or judge may require concerning any violation of law about which he may be questioned; and the proceedings to summon such witness and to compel him to testify shall, as far as possible, be the same as proceedings to summon witnesses and compel their attendance and testimony, and such witnesses shall be entitled to the same compensation as in other criminal proceedings." (3 Comp. Laws 1929, §17217, Stat. Ann. §28.943.)

"If upon such inquiry the justice or judge shall be satisfied that any offense has been committed and that there is probable cause to suspect any person or persons to be guilty thereof, he may cause the apprehension of such person or persons by proper process and, upon the return of such process served or executed, the justice or judge shall proceed with the case, matter or proceeding in like manner as upon formal complaint. And if upon such inquiry the justice or judge shall find from the evidence that there is probable cause to believe that any public officer, elective or appointive and subject to removal by law, has been guilty of misfeasance or malfeasance of office or wilful neglect of duty or of any other offense prescribed as a ground of removal, the said justice or judge shall make a written finding setting up the offense so found and shall serve said finding upon the public officer, public board or body having jurisdiction under the law to conduct removal proceedings against said officer. And said finding shall be a sufficient complaint as a basis for removal of said officer and the public officer, public board or public body having jurisdiction of removal proceedings against said officer shall proceed in the method prescribed by law for a hearing and determination of

> said charges. And in respect of communicating or divulging any statement made by such witnesses during the course of such inquiry, the justice, judge, prosecuting attorney and other person or persons who may, at the discretion of such justice, be admitted to such inquiry, shall be governed by the provisions of law relative to grand jurors." (3 Comp. Laws 1929, §17218, Sta. Ann. §28.944.)

The proceedings for the discovery of crime are not "prosecutions and proceedings * * * for crimes" within the meaning of the recorder's court jurisdiction statute. The circuit judge conducting the investigation had the authority to cause apprehension of defendant by proper process under the general code of criminal procedure.

In Re Watson, 293 Mich. 263, 269, we said:

> "At the outset it is contended that Judge Ferguson is without authority to investigate or proceed, for the reason that the crime in question in the instant case was committed in Detroit, and that the recorder's court has exclusive jurisdiction over crimes committed in that city. However, the judge, as a one-man grand jury, is empowered to investigate gambling in Wayne county by virtue of 3 Comp. Laws 1929, §§16300, 17217, (Stat. Ann. §§27.3561, 28.943), and may require any person who may be able to give any material evidence respecting such offense to attend as a witness and answer such questions as the judge may require concerning any violation of the law of about which he may be questioned."

In the Matter of Hickerson, . Mich. . . ., we said:

> "The statute referred to in the foregoing quotation *(In re Watson,* 293 Mich. 263), 3 Comp Laws 1929, §16300 (Stat. Ann. §27.3561), giving the recorder's court exclusive jurisdiction of crimes committed in the city of Detroit, reserved to the grand jury of Wayne county authority to investi-

> gate crimes in said county, the same as it had prior to the enactment of the statute. Thus it is seen that the situation in the Watson case was parallel to the facts herein, and it was held that the controlling element was the territorial jurisdiction of the court conducting the grand jury, not the limitations upon the court's power to hear and determine criminal cases."

It is urged by defendant that the "inquisition" statutes (3 Comp. Laws 1929, §17217 et seq.) require that warrants be returnable before the judge or court issuing them.

Under section 16301, 3 Comp. Laws 1929 (Stat. Ann. §27.3562), it is provided that indictments for offenses committed within the limits of the city of Detroit which may be found and presented to the circuit court by the grand jury shall be certified and transmitted to the recorder's court. The above statute also provides that the recorder's court shall then have full and complete jurisdiction and power to take all further proceedings thereon. It is our conclusion that the exclusiveness of jurisdiction of the recorder's court does not extend to the initiatory step in the institution of proceedings, but merely to matters subsequent thereto connected with bringing an offender to trial; and that the process was properly returnable to the recorder's court for the city of Detroit.

It is urged that the court was in error in permitting the prosecuting attorney to introduce evidence as to acts and statements of third parties, not in the presence or hearing of defendant, upon the ground that such third parties were conspirators with the defendant.

In addition to the facts hereinbefore stated, there was introduced in evidence testimony that Albert J. O'Connor was vice-president of the Koenig Coal and Supply Company; that his firm was interested in selling materials for

the construction project; that O'Connor became acquainted with Lipman before the Detroit housing commission opened its bids on the project and with Smith on the afternoon of the opening of the bids; that on August 20, 1940, O'Connor, Smith and Lipman met and discussed the housing project; that Smith and Lipman told O'Connor that, "it was going to cost a lot of money to get this job" and they asked him "to hold $30,000 for them to have available for them, or to expended at their request;" that the money was to be used to secure the contract "by getting the contract through the common council;" that O'Connor was given $30,000 which was deposited in a Chicago bank; that O'Connor informed defendant that he (O'Connor) had "that in my possession;" that on August 21, 1940, O'Connor, Smith and Lipman had an interview with defendant and had a discussion about concrete; that on August 27, 1940, O'Connor visited defendant and gave him $1,000 in currency; that on September 3, 1940, O'Connor again saw defendant and discussed the matter of the vote and that night the common council voted five to four in favor of concrete, with defendant voting for concrete; and that on September 18, 1940, O'Connor again saw defendant and paid him $4,000.

O'Connor testified as follows:

> "The first time I seen him that day (September 18, 1940) was in his office on Edmund Place, in the City of Detroit. Mr. Ewald said, 'When am I going to get the balance of my money?' I said, 'How much have you got coming?' He said $4,000.00. I said I would have to find out about it. I told him who I had to see, that I had to talk to Smith and Lipman about the balance. He said he wanted it that afternoon. I told him I would rather let it go until tomorrow, but he said no, he wanted it this afternoon. I told him then that I would have to see them and go out to the bank at

> Hamtramck to get it out of the bank, and he said, well you got an hour to do it in."

O'Connor also testified that after defendant received the money, he said to O'Connor, "we was mighty lucky to have gotten his vote for $5,000, because Morey Bein had offered him more money." There is also testimony that on one occasion after the contract had been signed, defendant said to Harry I. Dingeman, a fellow councilman, "Well, did you get yours," and when Dingeman replied, "yes" and asked defendant, "Did you," defendant "smiled and said, oh sure."

Over defendant's objection, the trial court admitted in evidence the conversations between O'Connor, Smith and Lipman on the theory that the people had made a prima facie showing of a scheme between the above mentioned persons and defendant to perpetrate an unlawful enterprise. In the case at bar, defendant is charged with accepting a bribe of money under the statute punishing the acceptor of a bribe, supra.

It is urged by the prosecuting attorney that it is permissible to show that plans well-laid in advance have led up to the commission of the offense charged; and that these plans are part of the *res gestae* of the crime.

In People v. Pitcher, 15 Mich. 396, we said:

> "The general rule is well settled that, where several persons are engaged in one common unlawful enterprise, whatever is said or done by any one of them in the prosecution of the common enterprise, or while it is still in progress, is evidence against all the parties to it."

See, also People v. Salsbury, 134 Mich. 537; People v. Baxter, 245 Mich. 229; People v. Frye, 248 Mich. 678; People v. Earl, 299 Mich. 579.

The evidence produced at the trial of this cause is of such a nature that a jury could find that O'Connor, Smith, Lipman and defendant entered into a conspiracy to obtain a contract by aid of defendant's vote as a member of the common council for concrete construction for the Detroit housing project. Under the rule above enunciated, statements of any of the persons engaged in the common unlawful enterprise could be used as evidence against defendant. There was no error in admitting this evidence at the trial of the cause.

It is also urged that the verdict was against the great weight of the evidence. It is to be noted that defendant did not take the stand in his own behalf or offer any proof whatsoever. There was evidence from which a jury could find that the payment of money to defendant was for corrupt purposes. The only evidence was that tending to establish the guilt of defendant. There was no evidence to weigh against it. It was for the jury to determine whether the evidence admitted was sufficient to establish guilt beyond a reasonable doubt. We find no reason for disturbing its findings.

But it is urged that the court was in error in refusing to charge the jury that corrupt intent on the part of the receiver, rather than the giver, of an alleged bribe was essential to conviction.

On the subject of "intent" the trial court instructed the jury as follows:

> "Intent is a necessary element in most crimes and it is necessary in this case. Under the common law, corrupt intent is said to be an intent to do a thing in a corrupt and wicked manner. Now, what is meant by a 'corrupt' manner? There are many definitions of corruptness, but they have reference to different types of crime. However, in this case,

I will first give you the request to charge No. 1 of the respondent:

"'I charge you that there can be no conviction for acceptance of a bribe unless the same be accepted with a corrupt intent, and even though you should find from the evidence that the defendant received some money, nevertheless, you cannot find him guilty unless you believe beyond a reasonable doubt that he received money with an intent at the time of receiving same to allow the receipt of money to influence his vote on the question of masonry and concrete or steel construction, and unless you do find beyond a reasonable doubt that he had such corrupt intent and intended to be influenced in his vote or decision by the receipt of money, then your verdict must be not guilty.' * * *

"I have been asked to charge by the respondent, and do charge as follows: Request to charge No. 18:

"'This prosecution is brought under section 118 of the Michigan Penal Code, which makes it a crime for an official to receive money or anything of value with a corrupt intent to permit his judgment to be influenced thereby. Under this section, it is not sufficient that the official may have received money. The law requires that there must be a corrupt intent with respect to the influencing of his official action, if you believe from the testimony before you that the receipt of money by the defendant did not influence his official action and was not received by him with any intention that it would or should influence his official action, then your verdict must be not guilty.'

"A corrupt act means an act characterized by an intent to gain advantage not consistent with one's official duty and the rights of others. It is also defined to be dishonest, without integrity, or

guilty of dishonesty involving liberty, as when one accepts money with the intent and purpose of being influenced into doing something inconsistent with his official duty as a public officer.

"A corrupt intent might exist for example, in receiving money for a corrupt purpose and with the knowledge of the person receiving same that such action upon his part would be illegal and unlawful. That might be evidence from which corruptness could be determined. But it is an intent, and it must be a corrupt intent.

"Now intent, of course, is something intangible. It is something we cannot see or observe. It is a man's state of mind or his reason or his purpose of doing something. For that reason, you must ordinarily determine intent from an examination of all the surrounding facts and circumstances, and that ordinarily is the way in which intent can be determined in the absence of a direct expression of intent. That is the only criterion by which we can determine intent. So, I say to you, therefore, you may determine intent from an examination of all the surrounding facts and circumstances and under the law, a person is presumed to intend the natural and probable consequences of his own unlawful and voluntary acts. That is a presumption which is not conclusive, but is a presumption which our courts approve—a presumption of intent from the voluntary doing of something which, if someone knows is illegal, the law may say or the jury may say, therefore, that one is presumed to intend the natural or probable consequences of his act. So, intent may be determined from all of the facts and circumstances.

"The corrupt intent with which one is charged in this information, a corrupt intent under the count of accepting a promise, of course, requires upon his part—the part of the receiver, that the intent must be in the mind of the person who has

received the bribe. The state of mind of the person who gives the bribe is not of any consequence. It is the state of mind of the person accused of the crime which is the criterion. If he receives the same voluntarily, knowingly—knowing it is unlawful and done with the purpose of influencing him in any manner in the discharge of his duty in public office, why he comes squarely within this particular section of the statute.

"So, I say the degree of the influence which is wielded upon him is not of any particular consequence so long as you can say that it is received by him with a corrupt intent to be influenced.

"Whether it be an influence to change his vote from one side to the other, or an influence accepted by him with the corrupt intent to remain in the same position with reference to any matter which may be brought before him—any of those things would be evidence which could go to the jury upon the question of corrupt intent, but intent must be established because this is a crime which is commonly called a 'common law crime' and common law crimes ordinarily require the proof of intent."

In our opinion the above charge upon this element of the crime fully covered the subject and amply protected defendant in his rights as a defendant.

We find no error in the trial of the cause and the judgment is affirmed.

Signed: Edward M. Sharpe
George E. Bushnell
Walter H. North
B. D. Chandler
Emerson R. Boyles
Raymond W. Starr
Henry M. Butzel
Howard Wiest

EXHIBIT "C"

STATE OF MICHIGAN—SUPREME COURT

Appeal from the Recorder's Court for the City of Detroit
Honorable W. McKay Skillman, Judge of
Recorder's Court

The People of the State of Michigan, Plaintiff and Appellee, v. Robert G. Ewald, Defendant and Appellant.	No. 41,849

MOTION FOR REHEARING AND BRIEF IN SUPPORT THEREOF

Edward N. Barnard,
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906 Dime Building,
Detroit, Michigan.

STATE OF MICHIGAN—SUPREME COURT

Appeal from the Recorder's Court for the City of Detroit
Honorable W. McKay Skillman, Judge of
Recorder's Court

The People of the State of Michigan, Plaintiff and Appellee, v. Robert G. Ewald, Defendant and Appellant.	No. 41,849

MOTION FOR REHEARING

Robert G. Ewald, defendant and appellant, by his attorney, Edward N. Barnard, respectfully moves this court for an order for a rehearing because:

1. The holding of this court that the exclusive jurisdiction of Recorder's Court does not extend to the initiatory step in the institution of proceedings but merely to matters subsequent thereto connected with the bringing of an offender to trial overrules Perrott v. Pierce, 75 Mich. 578, in which this court, on a question of jurisdiction based upon identical language, held a warrant to be void for want of jurisdiction.

2. In re Watson, 293 Mich. 263, relied upon, apparently, as at least somewhat supporting the holding of the court is no authority whatsoever for the proposition that a one man grand jury in Wayne Circuit Court can indict for Detroit offenses.

3. In re Hickerson, 301 Mich. 278, likewise cited by this court, when considered in the light of the facts of that

case, is authority against the decision of this court in the instant case.

4. The holding of this court that testimony of O'Connor as to statements and acts of Smith and Lippman not in the presence of defendant were admissible under the Prosecutor's claim of conspiracy is contrary to the well established rule that there is in law no conspiracy between the giver and the receiver of a bribe.

BRIEF IN SUPPORT OF MOTION FOR REHEARING

ARGUMENT

I.

The Decision Overrules Perriott v. Pierce, 75 Mich. 578

We note one statement in the decision of this court in the instant case to the effect that proceedings for the discovery of crime are not "prosecutions and proceedings * * * for crimes" within the meaning of the Recorder's Court Act. But in view of the further statement in the decision that "the exclusiveness of jurisdiction of the Recorder's Court does not extend to the initiatory step in the institution of proceedings, but merely to matters subsequent thereto connected with bringing an offender to trial" we assume that this court did not intend to make any distinction between a warrant issued by the one man grand jury and a warrant issued upon formal complaint without discovery proceedings.

If the decision of this court be so broadly construed, the decision is quite obviously at variance and inconsistent

with Perrot v. Pierce, 75 Mich. 578. As we pointed out in our reply brief, to which we respectfully refer this court for a more detailed argument, this court in the Perrott case held that a warrant issued by a Justice of the Peace in Bay City was void because, by the passage of an act creating a Police Court in Bay City whereby "original and exclusive jurisdiction" was given to the Bay City Police Court, the legislature had thereby deprived the Bay City Justice of the Peace of jurisdiction even to issue a warrant.

And even if the decision of this court in the instant case is not to be so broadly construed but is to be limited to a holding that warrants in discovery proceedings—as distinguished from warrants upon formal complaint—are initiatory process not within the jurisdiction clause of the Recorder's Court Act, we submit the decision is likewise unsound under the earlier decisions of this court in the Perrott v. Pierce case.

For if in discovery proceedings a Wayne Circuit Judge can issue a warrant returnable to Recorder's Court of Detroit, there seems to be no valid reason why a Recorder's Court judge sitting as a one man grand jury could not indict for a crime committed in Hamtramck, or Highland Park, and make the warrant returnable to Wayne Circuit Court. In other words, if the exclusiveness of the jurisdiction of the Recorder's Court does not apply to the initiatory proceedings, then there seems to be no statutory or other authority preventing the issuance of such a warrant by a Recorder's Court judge; and in that case both courts are of concurrent jurisdiction so far as concerns proceedings before trial. We submit that this was never the legislative intent.

In this connection we desire to point out also that by the Constitution (Article VII, Section 10) the jurisdiction of the Circuit Court in criminal matters is specified as "orig-

inal'' jurisdiction, this being of course, in contradistinction to ''appellate'' jurisdiction. There is no mention in the constitution of ''exclusive'' jurisdiction. Hence it seems to follow that if the decision of this court in the instant case stands, then a Recorder's Court judge sitting as a one man grand jury could issue warrants returnable to said court based upon crimes committed in Wayne County outside of the City of Detroit. We raise the question whether this court desires such a far reaching result in the absence of any express or implied legislative intent to that effect.

We therefore submit that the instant decision is contrary to Perrott v. Pierce, 75 Mich. 578, notwithstanding that in the latter case there was a warrant upon formal complaint, rather than upon discovery proceedings, and we suggest that if this court abide by its present decision, Perrott v. Pierce should be expressly overruled.

II.

In re Watson, 293 Mich. 263

Regardless of some of the language used by this court in its decision in the case of In Re Watson, 293 Mich. 263, the case, when viewed in the light of the facts therein presented, has no argumentative force in the instant case. The Watson case did not involve the power or jurisdiction of a Wayne Circuit Judge in discovery proceedings to issue a warrant predicated upon a Detroit offense. The judge in that matter was investigating gambling in Wayne County. It so happened that some of the facts concerning which the question asked of Watson pertained occurred in the City of Detroit; and it was Watson's claim that he could not be compelled to answer such question because they pertained to facts occurring in Detroit. We pointed out in

our previous brief that the right of such a judge to insist upon answers to questions asked for the purpose of determining whether crime had been committed in Wayne County in nowise depended upon where the facts occurred as long as they pertain to the commission of a crime within the territorial jurisdiction of the court.

For instance, a witness cannot refuse to answer questions before a one man grand jury merely because the question may pertain to acts which took place outside of the jurisdiction of the court provided that the questions do have a bearing upon the principal inquiry, namely, as to whether or not a crime has been committed within the jurisdiction of the court. So in the Watson case, if the question had pertained to actions of Watson in the State of Ohio, he still would have been required to answer notwithstanding that the Wayne Circuit Court obviously has no jurisdiction over offenses committed in Ohio; and the fact that Detroit is located inside the County of Wayne makes no change in principle. The Watson case is therefore no basis whatsoever upon which to predicate a holding that a Wayne Circuit Judge may issue a warrant covering a Detroit offense.

III.

In re Hickerson, 301 Mich. 278

We submit that the Hickerson case supports our position. That case holds that the phrase "within his jurisdiction" contained in the inquisition statute pertains to territorial jurisdiction rather than jurisdiction over various classes of offenses; in other words, the case holds that a justice of the peace, who has no jurisdiction to try felonies, may investigate the commission of felonies within his territorial jurisdiction even though he cannot try that

offense. But the Hickerson case does not hold that a justice of the peace, or any other judge can investigate the commission of either felonies or misdemeanors committed outside his territorial jurisdiction. Therefore, to argue that the Hickerson case supports the decision of this court in the instant case really begs the question because to make such an argument it must be assumed that the Circuit Judge has territorial jurisdiction in the investigation of Detroit offenses, which is the real question here.

If the Hickerson case had not been predicated upon territorial jurisdiction but rather upon the question of the jurisdiction of the judges to try various classes of offenses, then there might be some little basis for treating the Hickerson decision as authority here upon the ground that a Wayne Circuit Judge has jurisdiction over felonies and the instant crime was a felony. But since the Hickerson case clearly holds that it is a question of territorial jurisdiction, that case, if it has any bearing here, is authority for our contention that the exclusive jurisdiction granted by the Recorder's Court Act prevents a Wayne Circuit Judge from issuing a warrant covering a Detroit offense.

IV.

There Is In Law No Conspiracy Between a Giver and Receiver of a Bribe

As we understand the decision of this court, it is that the testimony O'Connor, otherwise hearsay, was competent and admissible upon the Prosecutor's theory that O'Connor, Smith, Lippman, and defendant entered into a conspiracy to obtain a contract by the aid of defendant's vote. This, we submit, is contrary to the well established principle that in bribery cases there cannot in law be a conspiracy

between the givers and the receiver of the bribe, and hence the defendant was not a co-conspirator with O'Connor, Smith, or Lippman, or any of them.

> "The gravamen of the charge is that the defendants conspired—united in purpose and agreed together—to commit an offense against the United States, and the object of the conspiracy is stated to have been—
>
> > 'To violate a law of the United States, to-wit, section one thousand seven hundred and eighty-one of the revised statute of the United States, by the said Charles H. Dietrich then and there fraudulently, willfully, corruptly unlawfully and knowingly agreeing with the Jacob Fisher to take and receive the sum of One Thousand Three Hundred Dollars from the said Jacob Fisher for procuring and aiding to procure a certain office for the said Jacob Fisher, to-wit, the office of United States postmaster at Hastings, State of Nebraska, from the government of the United States.'
>
> * * * * *
>
> "The agreement or transaction stated in this indictment was immediately and only between two persons, one charged with the intended taking and the other with the intended giving of the same bribe. Concert and plurality of agents in such an agreement or transaction are, in a sense, indispensable elements of the substantive offenses defined in section 1781, of agreeing to receive a bribe and of agreeing to give one. A person cannot agree with himself, receive from himself. The concurrent and several acts of two persons are necessary to the act of agreeing, receiving or giving.
>
> * * * * *
>
> "Because concert and plurality of agents in the sense we have hereinbefore shown, are essential to

each of the offenses—there are two, not one—the commission of which is charged to have been the object of this so-called conspiracy, and because no other concert and plurality of agents are here charged, we are of opinion that the acts described in the indictment do not constitute a conspiracy under section 5440."

United States v. Dietrich, 126 Fed. 664 (665).

Conclusion

For the reasons given we respectfully submit that an order should be made herein granting defendant a rehearing. In this connection we also point out that this case was in effect submitted on briefs owing to the inability, under the rule, of the prosecution to argue this case.

Respectfully submitted,

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Office - Supreme Court,
FILED
OCT 30 1942

IN THE

Supreme Court of the United States

OCTOBER 1942 TERM

No. 504

ROBERT G. EWALD,
Petitioner,
vs.
THE PEOPLE OF THE STATE OF MICHIGAN,
Respondent

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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IN THE

Supreme Court of the United States

OCTOBER 1942 TERM

No.....

ROBERT G. EWALD,
Petitioner,
vs.
THE PEOPLE OF THE STATE OF MICHIGAN,
Respondent

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I.

STATEMENT OF JURISDICTION

Petitioner herein, prays this court for a writ of certiorari to the Supreme Court of the State of Michigan to review the affirmance by that court on June 5, A. D.

1942, of which it denied a rehearing October 8, A. D. 1942, of petitioner's conviction of a felony commonly known as accepting a bribe by a public officer, in Recorder's Court for the City of Detroit; and the said Supreme Court of the State of Michigan being the highest court of said state, and it having by its final judgment of June 5, A. D. 1942, deprived petitioner of certain titles, rights, privileges, and immunities, guaranteed by Section 1 of the Fourteenth Amendment to the Constitution of the United States of America, as aforesaid, it is claimed that this Court has jurisdiction of the subject matter herein involved under Section 237 (b) of the Act of Congress of February 13, 1925, Chapter 229, 43 Sta. 936, which is as follows:

> "(b) It shall be competent for the Supreme Court, by certiorari to require that there be certified to it for review and determination, with the same power and authority and with like effect as if brought up by writ of error, any cause wherein a final judgment or decree has been rendered or passed by the highest court of a State in which a decision could be had where is drawn in question the validity of a treaty or statute of the United States, or where is drawn in question the validity of a statute of any State on the ground of its being repugnant to the Constitution, treaties, or laws of the United States; or where any title, right, privilege, or immunity is specially set up or claimed by either party under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States; and the power to review under this paragraph may be exercised as well where the Federal claim is sustained as where it is denied. Nothing in this paragraph shall be construed to limit or detract from the right to a review on a writ of error in a case where such a right is conferred by the preceding para-

graph; nor shall the fact that a review on a writ of error might be obtained under the preceding paragraph be an obstacle to granting a review on certiorari under this paragraph."

It is claimed that this petitioner's rights under the due process clause of the Fourteenth Amendment to the Constitution of the United States were violated by the determination of the Supreme Court of the State of Michigan because he was tried in a court not having competent jurisdiction. *Scott v. McNeal,* 154 U. S. 46, 4 S. Ct. 1108, 38 L. Ed. 896; *Central of Georgia R. Co. v. Mason,* 110 Fed. 865; *Charles v. Marion,* 98 Fed. 166; *In re Kelly,* 46 Fed. 653; *In re Monroe,* 46 Fed. 52.

It is further claimed by petitioner that his rights under the due process clause were violated by denial of his right to be confronted by the witnesses against him. *West v. State of Louisiana,* 194 U. S. 258, 48 L. Ed. 956; *Powell v. Alabama,* 287 U. S. 45, 63 S. Ct. 55, 77 L. Ed. 78; *DeYonge v. Oregon,* 299 U. S. 383, 57 S. Ct. 255; *Grosjean v. American Press Company, Inc.,* 297 U. S. 233, 56 S. Ct. 444; *Gitlow v. People of the State of New York,* 268 U. S. 652, 45 S. Ct. 625; and *Near v. State of Minnesota,* 283 U. S. 697, 51 S. Ct. 625.

The last foregoing cases are pronouncements of this Court holding that denial of fundamental rights such as freedom of speech, freedom of the press, right to counsel, etc., are violations of the due process clause of the Fourteenth Amendment to the Constitution of the United States.

II.

STATEMENT OF FACTS

This brief is filed in support of a petition for a writ of certiorari to the Supreme Court of the State of Michigan to review that court's affirmance of petitioner's conviction of accepting a bribe in Recorder's Court for the City of Detroit.

Petitioner was convicted (R. 137) before Honorable W. McKay Skillman, one of the Judges of Recorder's Court for the City of Detroit, by a jury, September 19, A. D. 1941, of the crime commonly called accepting a bribe by a public officer, and sentence was imposed October 10, A. D. 1941 (R. 138-140) that petitioner be confined to the State Prison of Southern Michigan for a period of not less than three (3) years or more than ten (10) years, without recommendation.

Thereafter, December 18, 1941, claim of appeal to the Supreme Court of the State of Michigan was filed, and after a hearing on the merits the Supreme Court affirmed the conviction on June 5, 1942. A petition for rehearing was denied October 8, 1942 (see certified record).

Petitioner, at the time this matter arose and many years prior thereto, was a member of the Common Council of the City of Detroit, the legislative body of that city, which body was clothed with certain administrative duties, among which was the duty of approving contracts to which the city or any city commission or board was to become a part (R. 27). There existed in the city a commission known as Detroit Housing Commission, created by an act of the Michigan Legislature and certain city ordinances, the function of which was to furnish low cost housing for certain residents of the

city (R. 29). At the time in question this commission was engaged in letting contracts for the construction of a housing project commonly referred to as Herman Gardens Housing Project. Pursuant to these efforts of this Commission there were two contracts submitted to the Common Council for its approval, one on behalf of A. Smith & Company, and the other on behalf of Lipman Construction Company. It was the theory of the prosecution that this petitioner accepted the bribe from these two companies, through their respective representatives, Seymour Smith and William Lipman (R. 24-26)—in other words, these persons were the givers of the bribes, which giving they did through one Albert J. O'Connor, who was the go-between (R. 24-26) and who was a witness in the case, for the purpose of influencing petitioner's vote and procuring his influence as a member of the Common Council in favor of these two contracts.

Though trial and conviction was had in Recorder's Court for the City of Detroit, the cause did not originate in that court, but in a different court, the Circuit Court for the County of Wayne. It happened in this wise:

Prior to March, 1941, the Prosecuting Attorney of Wayne County filed in the Circuit Court for the County of Wayne pursuant to a statute hereinafter quoted, a petition praying for the investigation of certain alleged crimes in the county (R. 7-13). The judges of that court granted the prayer of the petition, and appointed Honorable Homer Ferguson, one of their number, to sit as an investigator—as a one man grand jury so-called. Acting in this capacity, on March 19, 1941, Judge Ferguson issued a document (R. 7-13) variously called a complaint, a warrant, an indictment, a presentment, and complaint and warrant, charging this petitioner with the crime aforesaid in three counts, viz.: (1) That August 20, 1940, he had accepted the promise

of $1,000.00; (2) that August 27, 1940, he had accepted $1,000.00; and (3) that on September 18, 1940, he had accepted $4,000.00; all of the above were alleged to have been given and accepted, as we say, to procure Ewald's influence as a member of the Common Council, and his vote, in favor of the two said contracts (R. 7-13).

On the date of its issuance, petitioner was arraigned on said document, not in the Circuit Court from whence it issued, but in Recorder's Court for the City of Detroit, in the manner of arraignments on warrants.

On May 19 following a motion to quash the document was filed (R. 13-15). Later, on August 26, 1941, a plea to the jurisdiction (R. 16) was filed. Later a preliminary examination was had before a magistrate and the Prosecutor filed an information, charging defendant in the same manner as did the document issued out of the Circuit Court. A motion to quash (R. 17-19) this information was filed.

All of these motions were duly denied by the court. All of them, as appears in the record at the pages cited, raised the question of the jurisdiction of Recorder's Court for the City of Detroit, the last four grounds of the motion to quash the information, which reiterates in substance the grounds of the previous motions, being as follows (R. 17-19):

> "2. The warrant issued by the Honorable Homer Ferguson, Circuit Judge, on the 19th day of March, 1941, and apprehension and arrest of the defendant thereunder, are void and of no legal force or effect whatsoever in that the warrant shows upon its face that the crime, if any, was committed within the limits of the City of Detroit, and by reason thereof said Circuit Judge had no power or jurisdiction to investigate the same or to issue any warrant predicated thereon, or to take any

other action seeking the arrest and prosecution of defendant by reason thereof.

"3. Said warrant and the apprehension and arrest of the defendant thereunder are void and of no legal force or effect whatsoever because the filing of the complaint or petition of the Prosecuting Attorney for an investigation of the commission of alleged crime in the County of Wayne filed in the Circuit Court for the County of Wayne under miscellaneous No. 67,804 could not and did not vest any jurisdiction in said Circuit Judge or the Circuit Court to investigate or institute prosecutions for crimes committed outside the jurisdiction of the Circuit Court, namely, in the City of Detroit and hence within the original and exclusive jurisdiction of the Recorder's Court for the city of Detroit.

"4. In proceedings properly brought under Section 17,217 and 17,218 and other sections of the Compiled Laws of the State of Michigan for 1929 relative to the investigation of suspected offenses, the Judge before whom such investigation is being conducted has no power or jurisdiction to issue a warrant to require the defendant to be brought before any other judge than the one who issued the warrant under such proceedings, and said judge, therefore, had no power or jurisdiction to command the arresting officer to bring defendant before the Recorder's Court of the City of Detroit.

"5. No order in writing allowing the issuance of a warrant or process against defendant, signed by the Prosecuting Attorney, has been filed in this court; no complaint for that purpose has been filed in this court; no warrant for the apprehension and arrest of defendant has been issued out of this court; the warrant under which defendant was apprehended and arrested was not issued by any judge of this court in proceedings for the investigation of crime under Sections 17,217, *et seq.*, Compiled Laws of 1929; and no true bill against the

> defendant has been presented or returned to this court by any grand jury sitting herein pursuant to Section 17,221, *et seq.*, Compiled Laws of 1929; and by reason thereof, this court is wholly without power or jurisdiction to proceed against defendant in this manner."

Trial was had in Recorder's Court beginning September 16, before the Honorable W. McKay Skillman, one of the Judges of said court, and a jury.

At this trial Smith and Lipman were not called as witnesses but O'Connor was. Over objection that his testimony was hearsay, and that it denied defendant, this petitioner, his right to be confronted by the witnesses against him (R. 49-50), on the theory of the prosecutor that these persons were co-conspirators with petitioner (R. 24-26), the court permitted O'Connor to testify in answer to questions put to him by the prosecutor that on August 20, 1940, Lipman suggested that the witness contact petitioner by telephone, which he did (R. 58), that at that time Smith and Lipman stated that it would take a lot of money to get this contract and asked O'Connor to hold Thirty Thousand ($30,000.00) Dollars available to be expended at their request, to secure the contract for the Herman Gardens Project, and that right after the conversation Smith and Lipman gave O'Connor the Thirty Thousand ($30,000.00) Dollars (R. 61, 62) comprised of two checks,—$10,000 by Lipman and $20,000 by Smith, that O'Connor made out a deposit slip and gave the checks to Lipman for deposit in a Chicago bank, and that Lipman told O'Connor that defendant, this petitioner, had suggested that he, O'Connor, hold the money (R. 63), and that after the money had been deposited in the Chicago bank Smith asked O'Connor to call this petitioner on the telephone and to so inform him (R. 65), which O'Connor did, and that later Smith stated

to O'Connor, "that Mr. Ewald was a little uneasy and I better take him up a thousand dollars" (R. 68), and that Smith said, "We might as well take a chance and give it to him" (R. 68), all of which conversations, acts, and doings occurred in the said City of Detroit, County of Wayne, and State of Michigan, according to the testimony of the said O'Connor.

The jury found petitioner guilty as charged on September 19, 1941, and sentence was imposed as aforesaid. The cause was removed to the Supreme Court for the State of Michigan for review of errors, and among others the following errors were assigned (R. 2-6):

> "1. The court erred in overruling defendant's motion to quash the warrant and service thereof.
>
> "2. The court erred in overruling defendant's motion to quash the information.
>
> "3. The court erred in overruling defendant's plea to the jurisdiction.
>
> "4. The verdict is against the great weight of the evidence.
>
> "5. The verdict and judgment is contrary to law.
>
> "6. The court erred in permitting the witness O'Connor to give testimony, over timely, objections of defendant, as to acts done and statements made by certain parties, namely Smith and Lipman, such acts and statements having been made out of the presence and hearing of defendant, and the said Smith and Lipman being neither in fact nor in law co-conspirators with defendant.
>
> "7. The court was wholly without jurisdiction to proceed under an information which was predicated upon a warrant by a Circuit Judge for the County of Wayne sitting as a so-called one man

Grand Jury which had no jurisdiction to issue warrants based upon a crime committed in the City of Detroit.

"8. The court erred in overruling defendant's motion for a directed verdict of not guilty.

"10. The court erred in charging the jury as follows:

" 'You will note there is testimony offered here and endorsed on the information are the names of Smith and Lipman. You will note also that the court permitted this proof to go in; on the theory that is claimed by the Prosecution of a conspiracy between Smith and Lipman and O'Connor and Ewald to bring about the bribery of Ewald under Section 118, which I have read to you.

" 'It is on that theory that while Ewald is alone charged with the crime, yet it is claimed, and the theory of it is that that was by virtue of a conspiracy between those four persons that the bribery came about—this alleged bribery came about. So it is on that theory that I have permitted that evidence.

" 'What is a conspiracy? A conspiracy is an unlawful agreement or understanding between two or more persons to do an unlawful or illegal act. I don't need to mention the other phase because it isn't involved here. The rest of the definition is, "or to do a lawful act by illegal and unlawful means," but that isn't involved here. A conspiracy is an unlawful understanding between two or more persons to an unlawful or illegal act. The bribery of a public official under Section 118 is such an illegal and unlawful act. If you are satisfied beyond a reasonable doubt that there was such an illegal or unlawful understanding between these four men to bring about a violation of Section 118—that's the bribery

statute—if you are satisfied beyond a reasonable doubt, then you have satisfied your minds of the existence of a conspiracy.

" 'You must first, therefore, determine that there was such a conspiracy. A conspiracy is merely the unlawful agreement or understanding to bring about an unlawful act. If you find from the evidence, and all the evidence, that there was such an agreemet to do so, then you have established affirmatively in your mind the existence of such a conspiracy.

" 'If you have established the existence of such conspiracy, then under the rules of evidence, the statements, declarations and acts of co-conspirators, during the time of the conspiracy, which are not in the presence of the others, are admissible because that is one of the exceptions to the hearsay rule. In an ordinary case, what O'Connor said to Smith and Lipman, or either of them, not in the hearing and presence of Ewald, would not be admissible against Ewald, but if done on the theory of a conspiracy, and if the State establishes the existence of such a conspiracy in your minds beyond a reasonable doubt, you should entirely disregard any conversations had, not in the presence and hearing of the defendant Ewald, between O'Connor and Smith and Lipman or Smith or Lipman.'

"11. The court erred in charging the jury as follows:

" 'If you are to consider the conversations between O'Connor, Smith and Lipman, in the absence of Ewald, it will have to be on the theory that the four of them entered into a conspiracy. If you find such a conspiracy, beyond a reasonable doubt, to bring about the violation of Section 118, then and in that event, all that testimony is competent, and the weight to be given it is a question of fact for the jury.' "

The Supreme Court of the State of Michigan, after a full hearing on the merits, affirmed the sentence June 5, A. D. 1942, and denied a motion for a rehearing October 8, A. D. 1942. (See certified record.)

Petitioner here asks a writ of certiorari to review the action of the Supreme Court of the State of Michigan.

III.

SUMMARY OF ARGUMENT

A. Petitioner was denied rights and immunities guaranteed by the due process clause of the Fourteenth Amendment to the Constitution of the United States because he was tried, found guilty of a felony and sentenced, in Recorder's Court for the City of Detroit, which said court was without jurisdiction, for the following reasons:

1. The prosecution was originated by a document issued in another court, namely, the Circuit Court for the County of Wayne, which said document charged petitioner with a crime allegedly committed within the corporate limits of the City of Detroit and commanded that he be brought before said Recorder's Court for arraignment and trial, which said document the said Circuit Court had no jurisdiction to issue, because under the statute by virtue of which the proceedings were had in said Circuit Court that court had no jurisdiction as to crimes in any other jurisdiction than its own, which said jurisdiction did not extend within the corporate limits of the City of Detroit nor could said Circuit Court direct that he be brought before the said Recorder's Court under the terms of the same statute; wherefore, the said document was void and conferred no jurisdiction upon the said Recorder's Court.

2. Even had the aforesaid document issued from the Circuit Court as aforesaid been valid and within that

court's power to issue, it conferred no jurisdiction upon the said Recorder's Court because that court has exclusive and original jurisdiction of all felonies committed within the corporate limits of the City of Detroit, and prosecutions there can be initiated only by an indictment by a grand jury, or upon information preceded by a complaint; this document was neither, nor did it originate in Recorder's Court, wherefore said Recorder's Court never acquired jurisdiction.

B. Petitioner was further deprived of rights and immunities guaranteed by the due process clause of the Fourteenth Amendment to the Constitution of the United States because during his trial in Recorder's Court for the City of Detroit he was deprived of his fundamental right to be confronted by the witnesses against him when the witness O'Connor was permitted to testify as to the conversations, acts, and deeds of third persons not in the presence of defendant; and the court erred in allowing such testimony on the theory that it was statements, acts, and deeds of co-conspirators with defendant, because the third persons and O'Connor were givers of a bribe while petitioner was allegedly the acceptor of a bribe, which are two separate and distinct offenses, whereby there was no common intent, hence no conspiracy.

IV.

ARGUMENT

A. RECORDER'S COURT FOR THE CITY OF DETROIT WAS WITHOUT JURISDICTION IN THE CAUSE.

It was claimed in the trial court, by the motion to quash the document issued by the Circuit Court, by the plea to the jurisdiction, and by the motion to quash the information, that that court had no jurisdiction. The same claim was presented in the Supreme Court by the Assignments of Error as above. It was a claim insistently made throughout all of the proceeding below. Trial in a court without competent jurisdiction is a denial of due process.

The Circuit Court for the County of Wayne *exists* by virtue of Article VII of the Constitution of the State of Michigan, Sections 1 and 10, of which are as follows:

> Sec. 1. The judicial power shall be vested in one Supreme Court, circuit courts, probate courts, justices of the peace and such other courts of civil and criminal jurisdiction, inferior to the Supreme Court, as the legislature may establish by general law, by a two-thirds vote of the members elected to each house.
>
> Sec. 10. Circuit courts shall have original jurisdiction in all matters civil and criminal not excepted in this constitution and *not prohibited by law,* and appellate jurisdiction from all inferior courts and tribunals and a supervisory control of the same. They shall also have power to issue writs of habeas corpus, mandamus, injunction, quo warranto and certiorari and to hear and determine the same; and to issue such other writs as may be necessary to carry into effect their orders, judgments and decrees and give them general control over inferior

courts and tribunals within their respective jurisdictions, and in all such other cases and matters as the supreme court shall by rule prescribe.

It was to this court that the Prosecutor for Wayne County, sometime before March 19, 1940, presented his petition to investigate alleged crimes in Wayne County, and on which the court acted favorably and appointed one of its judges to sit as investigator. These proceedings were had pursuant to Sections 1 and 2 of Act 196 of the Public Acts of the State of Michigan for the year 1917, being Sections 17217 and 17218, Compiled Laws of the State of Michigan for the year 1929, to which we shall refer as the "Discovery Act," and which sections of the statute are as follows:

> 17217. Whenever by reason of the filing of any complaint which may be upon information and belief, any justice of the peace, police judge or judge of a court of record shall have probable cause to suspect that any crime, offense, misdemeanor or violation of any city ordinance shall have been committed *within his jurisdiction*, and that any person may be able to give any material evidence respecting such offense, such justice or judge in his discretion may, and upon the application of the prosecuting attorney, or city attorney in the case of suspected violation of ordinances, shall require such person to attend before him as a witness and answer such questions as such justice or judge may require concerning any violation of law about which he may be questioned; and the proceedings to summon such witness and to compel him to testify shall as far as possible, be the same as proceedings to summon witnesses and compel their attendance and testimony, and such witnesses shall be entitled to the same compensation as in other criminal proceedings.
>
> 17218. If upon such inquiry the justice or judge shall be *satisfied* that any *offense* has been *com-*

mitted and that there is *probable cause to suspect* any person or persons to be guilty thereof, he may cause the *apprehension of such person or persons by proper process and, upon the return of such process served or executed, the justice or judge shall proceed with the case, matter or proceeding in like manner as upon formal complaint.* And if upon such inquiry the justice or judge shall find from the evidence that there is *probable cause to believe that any public officer, elective or appointive and subject to removal by law, has been guilty of misfeasance or malfeasance of office or wilful neglect of duty or of any other offense prescribed as a ground of removal,* the said justice or judge shall make a written finding setting up the offense so found and shall serve said finding upon the public officer, public board or body having jurisdiction under law to conduct removal proceedings against said officer. And said finding shall be sufficient complaint as a basis for removal of said officer and the public officer, public board or public body having jurisdiction of removal proceedings against said officer shall proceed in the manner prescribed by law for a hearing and determination of said charges. *And in respect of communicating or divulging any statement made* by such witnesses during the course of such inquiry, the justice, judge, prosecuting attorney and other person or persons who may, *at the discretion of such justice, be admitted to such inquiry,* shall be governed by the provisions of law relative to grand jurors.

Acting under whatever authority these two sections of the statute conferred, the investigator, Honorable Homer Ferguson, one of the Judges of Wayne Circuit Court, on March 19, 1940, issued the nondescript document referred to variously as a warrant, a complaint, a presentment, and complaint and warrant, (R. 7-13), charging this petitioner with the offense named, and

directing his apprehension and commanding that he be brought, not before Wayne Circuit Court which issued the document, but before Recorder's Court for the city of Detroit.

This latter court differing from Wayne Circuit Court, is not created by any constitutional provision, but its existence rests wholly in the acts of the State Legislature. Recorder's Court was created as a successor to the pre-existing Police Court and Mayor's Court by the city charter of 1857, but it was created substantially as it now exists by Act No. 326 of the local acts of the State of Michigan for the year 1883, as amended, so that now it has jurisdiction of felonies, misdemeanors, and city ordinance violations. Section 11 of that Act, being Section 16300 of the Compiled Laws of the State of Michigan for the year 1929, to which we shall refer as the Jurisdiction Provision, provides:

> "The said Recorder's Court shall have original and exclusive jurisdiction of all prosecutions and proceedings in behalf of the people of this state, for crimes, misdemeanors and offenses arising under the laws of this state, and committed within the corporate limits of the city of Detroit, except in cases cognizable by the police court of the city of Detroit, or by the justices of the peace of said city; and shall have power to issue all lawful writs and process, and to do all lawful acts which may be necessary and proper to carry into complete effect the powers and jurisdiction given by this act, and especially to issue all writs and process, and to do all acts which the Circuit Courts of this state, within their respective jurisdictions, may, in like cases, issue and do by the laws of this state: Provided, That this section shall not be construed to prevent the grand jury for the county of Wayne from inquiring into and presenting indictments,

> as heretofore, for crimes and offenses committed within the limits of said city."

It is, we think, evident that this legislation carved out from the territorial jurisdiction of the Circuit Court a portion coincident with "the corporate limits of the City of Detroit" and vested "original and exclusive jurisdiction," extending to "all prosecutions and proceedings" as to offenses mentioned in the Recorder's Court; and that it did so was the holding of the Michigan Supreme Court in *People v. Hurst,* 41 Mich. 328, insofar as felonies are concerned. Indeed, we are very sure that the Prosecutor will agree that for many years the universal practice of Detroit and Wayne County has been that all felony cases wherein the venue was within the corporate limits of the City of Detroit have disposed of by Recorder's Court, while those within the County of Wayne but outside the city limits were disposed of by Wayne Circuit Court.

The question involved here is whether or not Recorder's Court acquired jurisdiction of the crime by virtue of the document issued by Judge Ferguson.

If the Circuit Court had no jurisdiction to issue the so-called warrant, it would, of course, be void whereupon it could confer no jurisdiction on Recorder's Court. Consequently the first question is whether or not the Circuit Court had such power.

Again, even if the Circuit Court had such power, the question arises whether the Recorder's Court had jurisdiction over a cause initiated in that manner.

These are the two issues as to jurisdiction as we see them.

(a) The Circuit Court Had No Jurisdiction to Issue the So-Called Warrant.

It will be observed that the Discovery Statute quoted above only goes so far as to authorize a judge to investigate an offense which "shall have been committed within his jurisdiction." No power exists to investigate crimes that may have been committed outside such jurisdiction. It is obvious that the allusion is to territorial jurisdiction, and so the Supreme Court of the State of Michigan held in *In re Hickerson,* 301 Mich. 278. The territory designated as "the corporate limits of the City of Detroit" has been carved right out of former jurisdiction of the Circuit Court by the Jurisdiction Provision above quoted. It is not in the jurisdiction of the Circuit Court, and consequently that court had no jurisdiction to investigate the crime charged in the so-called warrant, for it is shown on its face that the crime was allegedly committed in the City of Detroit. For this reason the so-called warrant was void.

Still further, the next section of the statute expressly provides how the investigating judge shall proceed if he finds that a crime has been committed within his jurisdiction, and this provision expressly precludes the action taken in the instant case. It provides that "upon the return of such process—the justice or judge shall proceed with the case—in like manner as upon formal complaint." This effectually precludes the issuance of any warrant containing a command to produce the prisoner before another court. Consequently the command to produce the prisoner before the Recorder's Court was void.

There was therefore nothing before the Recorder's Court when this petitioner was brought before it for arraign-

ment on the so-called warrant, so that that court did not then nor at any time later acquire jurisdiction. The so-called warrant was void under the terms of the statute which it was claimed authorized it.

In a comparatively early case in Michigan, *People v. Duncan,* 97 Mich. 632, the Supreme Court of that state held as follows:

> *Per Curiam.* Where, upon an affidavit made by the accused that the examining magistrate is a material witness for the prisoner, he is taken before another magistrate for examination by direction of the first magistrate, such action is illegal, and the justice who issued the warrant does not lose, nor does the other magistrate acquire, jurisdiction of the case; and the prisoner should be taken before the magistrate who issued the warrant, and he should proceed with the examination."

The Supreme Court of Michigan recently decided two cases, one of which we cited above, but which we would not mention in this connection had that court not done so in its opinion in this case, because we believe them to be utterly wide of the mark.

In Re Watson, 293 Mich. 263, held that the investigator sitting in Wayne Circuit Court might compel the attendance of a witness though he resided in the City of Detroit. It does not, however, hold that the investigator may issue a document charging a crime committed within the corporate limits of that city, nor to require the defendant to be brought before another court. The case simply isn't in point.

In re Hickerson, 301 Mich. 278, cited above, held that a justice of the peace, acting under the discovery statute, could inquire into the commission of crimes not cognizable by a justice of the peace. The Supreme Court of Michigan

held that the justice's power to investigate was not limited by the discovery statute to his power to hear and determine cases, but was limited by that act to its territorial jurisdiction, which is exactly what we contend. The court said, page 282:

> "Thus it is seen that the situation in the Watson case was parallel to the facts herein, and it was held that the controlling element was the *territorial* jurisdiction of the court conducting the grand jury, not the limitations upon the court's power to hear and determine criminal cases."

It will thus be seen that the Hickerson case is no more in point than the Watson case, except that the Michigan Supreme Court sustains us in what seems to us obvious, that the limitations of territorial jurisdiction apply and govern. In the instant case the Supreme Court did not follow its own ruling in the Hickerson case.

From the foregoing we think it clear that the so-called warrant, because it charges a so-called crime committed within the corporate limits of the City of Detroit, and was made returnable before Recorder's Court, was beyond the jurisdiction of the Wayne Circuit Court, and was therefore void.

(b) Even if the So-Called Warrant Were Valid, Recorder's Court Acquired No Jurisdiction.

There are in Michigan but two ways in which a criminal prosecution can be initiated,—first, by the indictment of a grand jury; and second, by a complaint filed or made on oath, followed by an information. Either an indictment or a complaint must appear in order to confer jurisdiction. Very specifically on this point, is a case where the pertinent statutes were as they are today, wherein the Michigan Su-

preme Court so held. In *Jankowski v. Connolly*, 197 Mich. 257, the court said:

> "It is therefore manifest that the only statutory methods whereby one may be prosecuted in the Recorder's Court of the city of Detroit are the following:
>
> (1) Upon on indictment returned by a grand jury sitting in the Circuit Court for the County of Wayne and duly certified and transmitted by the clerk of the Circuit Court to the Recorder's Court.
>
> (2) Upon an information signed by the prosecuting attorney of the County of Wayne upon which shall be indorsed the names of witnesses known to him, and which shall be filed during term in the said recorder's court."

Obviously this was not an indictment in the instant case for the investigator is not a grand jury, though popularly referred to as a "one man grand jury." This is manifest from the terms of the discovery statute itself because it provides for the secrecy of the proceedings that it "shall be governed by the provisions of law relative to the grand jury," thus recognizing that it, itself, is not a grand jury. Nor does the proviso in the Jurisdiction Provision, which expressly reserves to the Recorder's Court the power to initiate proceedings by indictment refer to the investigator, because this proceeding was not in existence until 1917, many years after the jurisdiction statute was enacted. Consequently a reference to the grand jury in the Jurisdiction Provision could not mean the investigator under the Discovery Statute. Nor does the Discovery Statute authorize the issuance of indictments, which is the essence and very existence of the grand jury. It is true that it may "cause the apprehension" of any person suspected of com-

mitting a crime, and then it must proceed "in like manner as upon formal complaint." This contemplates the subsequent examination of the alleged offender and an information by the Prosecuting Attorney—the very antithesis of an indictment.

This last mentioned provision of the Discovery Statute is, we think, quite convincing as to our position. When the investigator issues his process to apprehend the suspect, he is then to proceed "in like manner as upon formal complaint." In other words, the sworn testimony before the investigator takes the place of the usual complaint. His process by which the suspect is apprehended and brought into court is based thereon. This testimony, and it alone, gives him the power or jurisdiction to issue the process. But that testimony remains in his court. In the case at bar it was in the Circuit Court, and not in the Recorder's Court. Consequently when petitioner was arraigned in the Recorder's Court there was nothing before that court except the naked document itself, and it not in the court, but presumably in the hands of the officer to justify his custody of the defendant. It is the complaint that gives the court jurisdiction, not the warrant or process for apprehension of the defendant, for that is only a means of bringing the defendant into court. This elementary principle was laid down very early in *United States v. Burr*, 25 F. Cas. No. 14,692, Brunn. Coll. Cases 493, and in Michigan by the cases of *People v. McLean*, 68 Mich. 480, and *People v. Lynch*, 29 Mich. 274.

In the absence of any complaint or indictment, there never was any case initiated in Recorder's Court, so that that court never had jurisdiction, even though we should admit for the sake of the argument that the investigator could issue process for a crime committed in the City of Detroit.

But still further, we must remember that under the terms of the Jurisdiction Statute, Recorder's Court has "original and exclusive" jurisdiction. The exact language in another statute has been determined by the Michigan Supreme Court to preclude jurisdiction in any other court.

The case of *Perrott v. Pierce,* 75 Mich. 578, was decided by the Michigan Supreme Court in 1889. Realtor, a Justice of the Peace, sought by mandamus to compel Pierce, the Prosecuting Attorney for Bay County, to appear and prosecute a case before Realtor as Justice of the Peace. Respondent refused on the ground that the crime was committed within the limits of Bay City, and that the Police Court of that city by statute had "original and exclusive" jurisdiction, which deprived the Justice of jurisdiction. Reference to Section 161 of the Local Acts of the Legislature of the State of Michigan for the year 1887, shows the following, very similar in some respects to the Jurisdiction Statute in the instant case:

> "Sec. 161. The police court shall have exclusive and original jurisdiction to hear, try and determine all criminal cases wherein the crime, misdemeanor, or offense charged shall have been committed withinthe corporate limits of the city of Bay City, or upon any lands, tenements or hereditaments owned or occupied by or under the authority of the city of Bay City, within the County of Bay, and which crime, misdemeanor or offense would be, now or hereafter, cognizable by a justice of the peace if the same had been committed in any other part of this State; to entertain, conduct and dispose of all preliminary examinations into crimes, misdemeanors, or offenses, which shall have been committed within the corporate limits of Bay City; to hear, try and determine, or otherwise lawfully entertain, conduct and dispose of all cases and proceedings arising within the corporate limits of the

city of Bay City under the laws of this state relative to disorderly persons, illegitimate children, fugitives from justice from other states and foreign countries, the preservation of the public peace and the prevention of crime: Provided, however, That this act shall not be in any wise construed to interfere with or affect any of the powers of or the authority conferred by law upon the grand jury of the county of Bay."

The court said in the Perrott case, pages 578-580:

> "The *respondent denies the right of relator to issue the warrant* or to try the case, and insists that he is without jurisdiction to entertain proceedings therein; that the police court has exclusive jurisdiction to hear, try, and determine all criminal cases where the offense charged shall have been committed within the city, and which offense, if committed without the city, would have been within the jurisdiction of the justice to try and determine, under the general laws of the State giving the justices jurisdiction. * * *
>
> "The police court having the exclusive power to hear and try the case against the respondent therein, it follows that the *proceedings before the justice were unwarranted, and the prosecuting attorney was right* in not complying with the request of the justice, and the writ must be denied, but without costs."
>
> *Perrott v. Pierce*, 75 Mich. 578 (578-9, 580).

Because, then, the Recorder's Court had by the terms of the statute creating it original and exclusive jurisdiction of the crime, it could not be originated in another court. For this reason also the Recorder's Court was without jurisdiction.

(c) Trial in a Court Without Jurisdiction Is Denial of Due Process of Law.

That the Fourteenth Amendment to the Constitution of the United States guarantees to each citizen that he will not be deprived of liberty without due process of law is doubtless so elementary as to be taken for granted. Hardly less elementary is it that one of the primary requirements of due process is that he is, when charged with a felony, entitled to a trial in a court of competent jurisdiction, and is immune to trial in any other court.

This court said in *Scott v. McNeal,* 154 U. S. 46, 4 S. Ct. 1108, 38 L. Ed. 896:

> "The 14th Article of Amendments of the Constitution of the United States, after other provisions which do not touch this case, contains 'nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.' These prohibitions extend to all acts of the state, whether through its legislative, its executive or its judicial authorities. *Ex parte Viriginia ('Virginia v. Rives'),* 100 U. S. 313, 318, 319 (25:667, 669); *Ex parte Virginia,* 100 U. S. 339, 346 (25:676, 679); *Neal v. Delaware,* 103 U. S. 370, 397 (26:567, 574). And the first one, as said by *Chief Justice* Waite in *United States v. Cruikshank,* 92 U. S. 542, 554 (23:588, 592), repeating the words of *Mr. Justice* Johnson in *Bank of Columbia v. Oakley,* 17 U. S. 4 Wheat. 235, 244 (4:559, 561); was intended 'to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice.'
>
> "Upon a writ of error to review the judgment of the highest court of a state upon the ground that the judgment was against a right claimed under

the Constitution of the United States, this court is no more bound by that court's construction of a statute of the territory, or of the state, when the question is whether the statute provided for notice required to constitute due process of law, than when the question is whether the statute created a contract which has been impaired by a subsequent law of the state, or whether the original liability created by the statute was such that a judgment upon it has not given due faith and credit in the courts of another state. In every such case, this court must decide for itself the true construction of the statute. *Huntington v. Attrill,* 146 U. S. 657, 683, 684 (36:1123, 1133); *Mobile & O. R. Co. v. Tennessee, ante,* p. 793.

"No judgment of a court is due process of law, if rendered without jurisdiction in the court, or without notice, to the party.

"The words 'due process of law,' when applied to judicial proceedings, as was said by *Mr. Justice* Field, speaking for this court, 'mean a course of legal proceedings according to those rules and principles which have been established in our systems of jurisprudence for the protection and enforcement of private rights. To give such proceedings any validity, there must be a tribunal competent by its constitution—that is, by the law of its creation—to pass upon the subject-matter of the suit; and if that involves merely a determination of the personal liability of the defendant, he must be brought within its jurisdiction by service of process within the state, or his voluntary appearance.''

Scott v. McNeal, 38 L. Ed. 896 (901).

In re Monroe, 46 F. 52, involved an application for a writ of *habeas corpus.* The court said at pages 53-4:

"The very first question that meets us upon the threshold of a case where a writ is issued which may affect proceedings of the state court is, does

the federal court have jurisdiction to issue a writ in behalf of the liberty of a citizen who is alleged to be illegally restrained? How far may the federal court go in its investigation of the legality of the process, which, as is alleged, is in restrain of the liberty of a citizen of the state, or of the United States? There seems to be a misconception in the public mind as to the power of the federal court in this regard, and it is a mystery in my mind how that misconception can exist in the face of the constitution and laws of the United States. There is no invasion of any prerogative or power of the state by the exercise of jurisdiction of this kind, because there is no prerogative that belongs to any state, nor is there any power or jurisdiction in a state to deprive any citizen of liberty without due process of law. The constitution of the United States, by the first section of the fourteenth amendment, provides that: 'Nor shall any state deprive any citizen of life, liberty, or property without due process of law.' When a citizen is deprived of any of these rights, the power of the United States can be invoked in behalf of the citizen. The constitution of the United States, by its own terms, erects an insurmountable barrier against any state or federal authority that can be exercised to restrain the liberty of a citizen without legal warrant. It matters not whether it is done under color of state authority or national authority; it is a restraint of liberty that is unwarranted, and the authorities upon that subject are abundant, and some of them are cases very similar to this. That which is a part of a state has of course no higher power than a state. A municipal government is carved out of a state, and is a part of the state machinery. Wherever there is an inhibition against a state doing a thing, the supreme court of the United States in many cases has held that the inhibition goes against any part of the legal machinery of the state, as

well as against the whole of it. In California in the case that is recognized as the *Stockton Laundry Case*, 26 Fed. Rep. 611, it was decided that a party who was held in custody for a violation of a city ordinance which is in conflict with the fourteenth amendment to the constitution is entitled to be discharged on *habeas corpus;* and in the *Laundry License Case,* 22 Fed. Rep. 701, it was held that, under the Revised Statutes of the United States, Secs. 751-755, federal courts have jurisdiction of *habeas corpus* proceedings in the case of imprisoned without due process of law under an invalid city ordinance. In a comparatively recent case decided by Judge Gresham *(Ex parte Perkins*, 29 Fed. Rep. 908) it is declared:

> "'An order or judgment of a court, acting within its jurisdiction, punishing a party or other person for contempt of its authority, cannot be reviewed or annulled by another court; but if a court having no jurisdiction over the parties or the subject-matter before it sentences a party, a witness, or any other person to imprisonment for contempt of its authority, the person thus illegally deprived of his liberty may be released by any court authorized to issue writs of *habeaas corpus.*'

"The court in that case refers to a great many other cases but the doctrine is so well enunciated that it is hardly necessary for me to refer to them."

In re Monroe, 46 Fed. Rep. 52 (53-4).

In re Kelly, 46 F. 653, also involved a *habeas corpus.* The court said at page 659:

> "The Clatsop county justice assumed jurisdiction of a crime not committed or triable in his county, and his commitment is void, not due process of law. Being an officer of the state, his act is so far that of the state, and violates the four-

> teenth amendment, which prohibits any state from depriving 'any person of life, liberty, or property without due process of law.' "
>
> *In re Kelly,* 46 F. 653 (659).

Petitioner herein having been tried in and sentenced by a court not having jurisdiction, we believe his rights under the due process clause of the Fourteenth Amendment to the Constitution of the United States have been violated, and that a writ of certiorari should issue as prayed.

B. PETITIONER WAS DENIED THE RIGHT TO BE CONFRONTED BY THE WITNESSES AGAINST HIM.

By the testimony of the witness O'Connor, over the objection of this petitioner that he was being denied the right of being confronted by the witnesses against him, the Prosecutor introduced into evidence the conversations, acts, and deeds of Smith and Lipman, who were not sworn and who did not testify. The substance of this testimony went to the heart of the case, and without it the Prosecutor would not have had a *prima facie* case.

The Court admitted this testimony on the theory that there was evidence from which the jury might find that O'Connor, Smith, and Lipman were co-conspirators with Ewald, whereby the testimony would be admissible as statements and acts of co-conspirators. In this we think the court was in error, for the following reasons:

This petitioner was charged with the crime of accepting a bribe as a public officer, each of the three counts charging a violation of the same statute, being Section 118 of the Michigan Penal Code, which is Act 328 of the Public Acts of the State of Michigan for the year 1931,

Michigan Annotated Statutes, Section 28.313. It was the theory of the Prosecutor, and the evidence tended to show that O'Connor, Smith, and Lipman were the givers of the bribe. Giving a bribe to a public officer is provided for in the next preceding section of the same statute, namely, Section 117.

It has been definitely established in Michigan that the giving of a bribe and accepting of a bribe are two separate and distinct crimes. In *People v. Frye,* 248 Mich. 678, the Michigan Supreme Court said at pages 682-3:

> "Bribery is not a joint offense of the giver and receiver, although physical acts of at least two persons must concur to render one guilty of receiving a bribe. Under our statutes, it is made a separate offense as to each, is defined in separate paragraphs, and different penalties are provided. Personal, not joint, corrupt intent is an element of each offense. The giver of a bribe is punishable under 3 Comp. Laws 1915, Sec. 14978, and his offense is complete when he corruptly offers a bribe, although the other refuse it or take it innocently or to deliver the giver to justice. The receiver is chargeable under Sec. 14979, and his offense is complete when he corruptly accepts a bribe, although the giver has no corrupt intent in offering the gift. The following authorities support the separate nature of the offenses of giving and receiving bribes, both at common law and under statutes similar to ours, and hold that one may be convicted and the other acquitted. We have found no authorities to the contrary. *Henslow v. Faucett,* 3 A. & E. 51; *People v. Bunkers,* 2 Cal. App. 197 (84 Pac. 364, 370); *United States v. Dietrich* (C.C.) 126 Fed. 664; *Commonwealth v. Murray,* 135 Mass. 530; *State v. Dudoussat,* 47 La. Ann. 977, (17 South. 685); *Sims v. State,* 131 Ark. 185

(198 S. W. 883); *Minter v. State,* 70 Tex. Cr. 634 (159 S. W. 286)."

People v. Frye, 248 Mich. 678 (682-3).

Since the two crimes are distinct, the giver and acceptor of a bribe do not and cannot have a common purpose, and therefore cannot be co-conspirators. It was so held in *U. S. v. Dietrich,* 126 Fed. 664. Consequently, the testimony of O'Connor was not as to the statements of co-conspirators, and petitioner was deprived of the right to be confronted with Lipman and Smith whose statements and deeds were put upon the record through the testimony of O'Connor.

This court has always held that denial of fundamental rights, such as the right to counsel, the right to a jury trial, etc., is a denial of due process of law. Very recently in *Glasser v. U. S.; Kritze v. U. S.;* and *Roth v. U. S.,* ... S. Ct. ....., 86 L. Ed. 405, this court held, with reference to denial of a full right to have counsel was in a federal court, denial of due process, contrary to the Sixth Amendment to the Constitution. The court went on to say, speaking through Mr. Justice Murphy:

> "Even as we have held that the right to the assistance of counsel is so fundamental that the denial by a state court of a reasonable time to allow the selection of counsel of one's own choosing, and the failure of that court to make an effective appointment of counsel, may so offend our concept of the basic requirements of a fair hearing as to amount to a denial of due process of law contrary to the Fourteenth Amendment. *Powell v. Alabama,* 287 U. S. 45, 77 L. Ed. 158, 53 S. Ct. 55, 84 A. L. R. 527, so are we clear that the 'assistance of counsel' guaranteed by the Sixth Amendment contemplates that such assistance be untrammeled and unimpaired by a court order requiring that one lawyer shall simultaneously represent conflicting interests. If

the right to the assistance of counsel means less than this, a valued constitutional safeguard is substantially impaired.

"To preserve the protection of the Bill of Rights for hard-pressed defendants, we indulge every reasonable presumption against the waiver of fundamental rights. *Aetna Ins. Co. v. Kennedy,* 301 U. S. 389, 81 L. Ed. 1177, 57 S. Ct. 809; *Ohio Bell Teleph. Co. v. Public Utilities Commission,* 301 U. S. 292, 81 L. Ed. 1093, 57 S. Ct. 724."

Glasser v. United States, 86 L. Ed. 405 (412).

The right of a defendant to be confronted by the witnesses against him has been held to be a fundamental right. *West v. Louisiana,* 194 U. S. 258, 48 L. Ed. 965.

Other cases where this court has held that denial of a fundamental right by a state court is contrary to due process of law, and a violation of the Fourteenth Amendment to the Constitution of the United States are:

Powell v. Alabama, 84 L. Ed. 527;
DeYonge v. Oregon, 299 U. S. 353, 57 S. Ct. 255;
Grosjean v. American Press Co., Inc., 297 U. S. 233, 56 S. Ct. 444;
Gitlow v. People of the State of New York, 268 U. S. 652, 45 S. Ct. 625;
Near v. State of Minnesota, 283 U. S. 697, 51 S. Ct. 625.

The petitioner was denied in the Recorder's Court for the City of Detroit at his trial the fundamental right to be confronted by the witnesses against him. This is contrary to the due process clause of the Fourteenth Amendment to the Constitution of the United States. This matter was urged upon the Supreme Court of that state through assignments of error.

V.

RELIEF SOUGHT

Petitioner asks that a writ of certiorari issue from this court to the Supreme Court of the State of Michigan to review its affirmance on June 5, 1942, of the sentence imposed by the Recorder's Court of the City of Detroit, and said Supreme Court's denial of an application for rehearing of October 8, 1942.

Respectfully submitted,

EDWARD N. BARNARD,
Attorney for Petitioner,
906 Dime Building,
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Dated: October 29, A. D. 1942.

Office - Supreme Court, U. S.
FILED
DEC 4 1942
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER 1942 TERM

No. 504

ROBERT G. EWALD,
Petitioner,
vs.
THE PEOPLE OF THE STATE OF MICHIGAN,
Respondent

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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ARGUMENT

I. THE PETITION FOR WRIT OF CERTIORARI IS INSUFFICIENT UNDER THE APPLICABLE COURT RULES TO CONFER JURISDICTION UPON THIS COURT TO REVIEW THE JUDGMENT OF THE SUPREME COURT OF MICHIGAN.

Rule 38, Section 2, of the Revised Rules of the Supreme Court of the United States (adopted February 13, 1939, effective February 27, 1939) fixing the requirements for a petition for writ of certiorari to review a decision of the supreme court of a state provides:

> "The petition shall contain a summary and short statement of the matter involved; a statement particularly disclosing the basis upon which it is con-

> tended that this court has jurisdiction to review the judgment or decree in question. (See Rule 12, Par. 1);"

that portion of Rule 12, Paragraph 1, relating to appeals from a state court requires a jurisdictional statement in the petition; the text of the rule is as follows:

> "If the appeal is from a state court the statement shall include a statement of the grounds upon which it is contended the questions involved are substantial (*Zacht v. King,* 260 U. S. 174, 176, 177); specify the stage in the proceedings in the court of first instance, and in the appellate court, at which, and the manner in which, the federal questions sought to be reviewed were raised; the method of raising them (e. g., by a pleading, by request to charge and exceptions, by assignment of error); and the way in which they were passed upon by the court; with such pertinent quotations of specific portions of the record, or summary thereof, with specific reference to the places in the record where the matter appears, (e. g., ruling on exception, portion of the court's charge and exception thereto, assignment of error) as will support the assertion that the rulings of the court were of a nature to bring the case within the statutory provision believed to confer jurisdiction on this court. The provisions of this paragraph, with appropriate record page references, must be complied with when review of a state court judgment is sought by petition for writ of certiorari. (See Rule 38, Par. 2.)"

A summary of the court rule requires the jurisdictional statement to contain the following:

> (a) The stage in the state court proceedings to which, and the manner in which, the federal questions were raised;
>
> (b) The method of raising federal questions;

(c) The way in which they were passed upon by the state court;

(d) Specific reference to the record where the federal questions appear.

An examination of the petition for writ of certiorari will show that no proper jurisdictional statement has been made to this court. No reference is made to any constitutional question presented to the state court, and no decision on any constitutional question appears in the record. The "Statement of Jurisdiction" contained in petitioner's brief refers to Section 237 (b) of the Act of Congress of February 13, 1925 and then states that the judgment of the Supreme Court of Michigan violated the Fourteenth Amendment to the Federal Constitution because petitioner was tried in a court not having competent jurisdiction, and because he was not confronted by the witnesses against him. The statement does not refer to any part of the record in the state court in which petitioner asserted any of the foregoing claims.

The petitioner is not in a position to comply with Rule 12, aforementioned, because no federal question was raised in the state court, as will appear more fully from the discussion which follows. Because the court rule was not complied with, the petition for writ of certiorari should be denied.

II. NO FEDERAL QUESTION CONSTITUTING AN APPROPRIATE GROUND FOR REVIEW WAS PRESENTED IN OR DECIDED BY THE STATE COURT.

The issuance of a writ of certiorari by the Supreme Court of the United States is a matter within the discretion of the Court. "Upon application to this Court for review of the judgment of a state court, it is the petitioner's burden to show affirmatively that we have jurisdiction." (Justice Stone in *Memphis Natural Gas Company v. Beeler,* 315 U. S. 649, 62 Sup. Ct. Rep. 857.) It is respondent's position that petitioner has not affirmatively shown that this Court has jurisdiction to review the judgment of the state court.

The petitioner in his brief in support of the petition for writ of certiorari, under the heading, "Statement of Jurisdiction," claims that this Court has jurisdiction by virtue of Section 237 (b) of the Act of Congress of February 13, 1925, Chapter 229, 43 Statutes 936. Respondent maintains that this statute does not give the Court jurisdiction in the case at bar. The statute provides that this Court can review a state court decision where there is "drawn in question the validity of a treaty or statute of the United States, or where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States; or where any title, right, privilege, or immunity is specially set up or claimed by either party under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States." At no point in the state court proceedings was there "drawn in question" any right, title, privilege or immunity claimed by petitioner under the Constitution of the United States. Petitioner did not claim during the trial in the lower court, nor in

the Supreme Court of Michigan, that he was denied any right guaranteed to him under the Federal Constitution, so no problem of construing the Federal Constitution was "drawn in question" to justify this Court in granting certiorari to review the proceedings in the state court.

An examination of the record in the trial court, and of the opinion of the Supreme Court of Michigan, will show that no Constitutional question was presented or decided by the state court. There is not even a single reference to the Federal Constitution in the proceedings below. Petitioner's only claim in this Court is that the Supreme Court of Michigan by its judgment deprived him of certain constitutional rights, but because no such claim was asserted in the state court, or in any manner brought to the attention of that court, this Court should not review the proceeding. As was stated in *Dewey v. Des Moines,* 173 U. S. 193, 199:

> "It is not enough that there may be somewhere hidden in the record a question which, if raised, would be of a Federal nature. *Hamilton Mfg. Company v. Mass.,* 6 Wall. 632. In order to be available in this Court some claim or right must have been asserted in the court below by which it would appear that the party asserting the right founded it in some degree upon the Constitution or laws or treaties of the United States. In such case, if the court below denied the right claimed, it would be enough; or if it did not in terms deny such right, if the necessary effect of its judgment was to deny it, then it would be enough. *But the denial, whether express or implied, must be of some right or claim founded upon the Constitution or the laws or treaties of the United States, which had in some manner been brought to the attention of the court below.*"

Supported by *Mellon v. O'Neil,* 275 U. S. 212, 48 Sup. Ct. Rep. 62, 72 L. ed. 245; *McGoldrick v. Gulf Oil Corporation,* 309 U. S. 2, 60 Sup. Ct. Rep. 375, 84 L. ed. 536. The peti-

tioner cannot point out to this Court any place in the record in which he urged the state court to reverse his conviction because he was denied a right granted to him by the Fourteenth Amendment to the Federal Constitution, and consequently it cannot be said that the Supreme Court of Michigan denied petitioner any federal right because

> "A claim or right which has never been made or asserted cannot be said to have been denied by a judgment which does not refer to it. *Hamilton Company v. Mass.*, 6 Wall. 632. A point that was never raised cannot be said to have been decided adversely to a party who never set it up or in any way alluded to it. Nor can it be said that the necessary effect in law of a judgment which is silent upon the question is the denial of a claim or right which might have been involved therein, but which in fact was never in any way set up or spoken of. (*Dewey v. Des Moines*, 173 U. S. 196, 200;)"

Followed in *Northwestern Bell Telephone Company v. Nebraska Railway Commission*, 297 U. S. 471; *Herndon v. Georgia*, 295 U. S. 441, 442.

If petitioner believed that in the course of his prosecution he was denied any constitutional right, it was his duty to make a proper objection on this ground in the trial court, and in the Supreme Court of Michigan, and ask for rulings thereon, so that the claim would be a matter of record. In this way he might have created a right to have the state court proceedings reviewed by this Court,

> "If a party to an action in a state court intends to invoke for the protection of his rights the Constitution of the United States, or some treaty, statute, commission, or authority of the United States, he must so declare. (*Chapin v. Fye*, 179 U. S. 127.)"

On appeal to this Court, the record must show affirmatively that the objection to the state court proceedings was made

on federal grounds in the court below. *House v. Road Improvement District No. 2,* 266 U. S. 175, 45 Sup. Ct. Rep. 60, 69 L. ed. 229; *Whitney v. People of California,* 274 U. S. 357, 47 Sup. Ct. Rep. 641, 71 L. ed. 1095; *Edward Hines Yellow Pine Trustees v. Martin,* 268 U. S. 458, 45 Sup. Ct. Rep. 543, 69 L. ed. 1050; *Cornell v. Green,* 163 U. S. 75, 16 Sup. Ct. Rep. 969, 41 L. ed. 76; *Appleby v. City of Buffalo,* 221 U. S. 524, 31 Sup. Ct. Rep. 699, 55 L. ed. 839.

Petitioner's claim in his petition for writ of certiorari that the judgment of the Supreme Court of Michigan was against the Fourteenth Amendment to the Federal Constitution is not sufficient justification for allowing certiorari. As stated by Justice Brandeis in *Hiawassee River Power Company v. Carolina-Tennessee Power Company,* 252 U. S. 341, 40 Sup. Ct. Rep. 330, 64 L. ed. 729:

> "If a general statement that the ruling of the state court was against the 14th Amendment were a sufficient specification of the claim of a right under the Constitution to give this court jurisdiction, * * * still the basis for a review by this court is wholly lacking here. For the 14th Amendment was mentioned only in the trial court. In the supreme court of the state no mention was made of it in the assignment of errors; nor was it, so far as appears by the record, otherwise presented to or passed upon by that court. The denial of the claim was specifically set forth in the petition for the writ of error to this court and in the assignment of errors filed here. But obviously that was too late. *Chicago, I. & L. R. Company v. McGuire,* 196 U. S. 128, 132, 49 L. ed. 413, 417, 25 Sup. Ct. Rep. 200. The omission to set it up properly in the supreme court of the state was not cured by the allowance of the writ of error by its chief justice * * *."

The questions which the petitioner suggests in his brief in support of his petition for writ of certiorari as being

constitutional questions are raised for the first time by his petition. From the foregoing authorities it appears that this Court does not now have jurisdiction to entertain the petition.

CONCLUSION

Respondent prays that the petition for writ of certiorari be denied.

Respectfully submitted,

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